91-88

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL,
Petitioner,

v.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D. G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents. _____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Of Counsel:
DEELEY, KING & PANG
DENNIS W. KING 1734
(Counsel of Record)
WILLIAM J. DEELEY 2386
810 Richards Street, Suite 810
Honolulu, Hawaii 96813-4721
Telephone No. (808)533-1751

Attorneys for Petitioner

Questions Presented for Review

1. Must political affiliation and/or support be the "sole basis" of a public employee's demotion to constitute a deprivation of his First Amendment rights of political belief and association, or need they only be a "substantial or motivating factor" in his demotion to constitute a deprivation?

2. Has a demoted civil servant been deprived of his First Amendment rights of political belief and association if his own political affiliation and/or support of a Democratic mayoral candidate is unrelated to the demotion decision which is made to create a position to reward his Republican replacement for the replacement's political affiliation and support of a Republican Mayor?

3. Is a demoted civil servant deprived of due process under the Fourteenth Amendment to the United States Constitution where two City Civil Service Commissioners, who cast the tying and deciding votes against him in a post-deprivation appeal hearing, are determined almost 5 years later not to have been impartial?

4. Are a demoted civil servants' due process rights under the Fourteenth Amendment to the United States Constitution violated by the civil service system that enables a Mayor who is being sued for having demoted a civil servant (1) to appoint the members to the Civil Service Commission who are not impartial after the date that an appeal has been filed with the Commission and where two of those Commissioners later cast tying and deciding votes on the appeal, (2) to delay the Commission's appeal hearing, (3) to alter Commission customs and practices, and (4) to utilize the City's Corporation Counsel to simultaneously represent the Mayor as a Defendant and the Commission as the administrative hearing agency?

5. Whether a civil servant was deprived of Procedural and Substantive due process under the Fourteenth Amendment to the United States Constitution where he was deprived of a liberty interest (from a stigmatization of his reputation) in connection with his demotion and/or where he was demoted for no lawful purpose.

[Note: Petitioner reserves the right to argue Question 6 in the event certiorari is granted on the above questions, but does not include Question 6 among the reasons for the grant of certiorari.]

6. Whether the Court erred in dismissing Petitioner's First Amendment and Due Process Claims and his 42 U.S.C. 1983 claims under *Parratt* v. *Taylor*, 451 U.S. 527 (1981).

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL, Petitioner

v.

CITY AND COUNTY OF HONOLULU, et al., Respondents[1]

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner Malcolm A. Sussel ("Sussel") respectfully prays that a Writ of Certiorari issue to review the Order and Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit entered on December 6, 1990 together with the February 7, 1991 Order amending the Memorandum Opinion and the Judgment thereafter entered on May 9, 1991.

OPINIONS BELOW

The Order and Memorandum Opinion of the Court of Appeals For the Ninth Circuit entered on December 6, 1990 and its February 7, 1991 Order amending that Opinion are not published case opinions but are appended hereto as Appendices A and B, respectively. Appendix C contains the primary Decision of the United States District Court for the District of Hawaii entered on March 3, 1989 granting Defendants' Motions for Summary Judgment. Appendix D contains the District Court's April 21, 1989 Order Granting In Part and Denying In Part Plaintiff's and Defendants' Motions for Reconsideration. Appendix E is the Ninth Circuit's May 9, 1991 Judgment.

JURISDICTION

Invoking federal jurisdiction under the First and Fourteenth Amendments to the United States Constitution and under 42 U.S.C. 1983, 28 U.S.C. 1343(a)(3), (4), and 28 U.S.C. 2201 and 2202, the Petitioner brought this suit in the United

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1 All parties in this proceeding are listed in the caption on the cover of this Petition.

States District Court for the District of Hawaii by filing his Complaint on December 15, 1986 in DC No. 86-1136.[2] On March 3, 1989 the District Court entered its Decision granting Defendants' Motions for Summary Judgment and for other relief on all of Petitioner's federal jurisdictional claims. On Petitioner's appeal, the Ninth Circuit affirmed the District Court with regard to its grant of summary judgment in favor of Defendants on all of Petitioner's federal jurisdictional claims when it entered its Order and Memorandum Opinion on December 6, 1990 together with its February 7, 1991 Order amending the Memorandum Opinion. A timely Petition for Rehearing was filed by Petitioner on or about February 20, 1991 and an Order denying that Petition was entered on March 7, 1991. The jurisdiction of this Court to review the December 6th and February 7th Orders and Memorandum Opinion of the Ninth Circuit is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Amendment I, United States Constitution: "Congress shall make no law . . . abridging the freedom of speech . . . the right of the people peaceably to assemble . . ."

Amendment XIV, United States Constitution, Section 1, Clause 2: ". . . nor shall any State deprive any person of . . . liberty, or property, without due process of law. . . ."

42 U.S.C. 1983:

"1983. *Civil action for deprivation of rights*

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

STATEMENT OF THE CASE

A. Nature of The Case

Petitioner Malcolm A. Sussel ("Sussel") appeals from summary judgment granted in favor of his employer, the City, and his co-employees, Respondents Mayor Fasi, Managing Director Anderson, Civil Service Director Fukuda, and his

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2 A second Complaint (DC No. 88-00375) was filed by Plaintiff on May 4, 1988 in state court (and immediately removed to federal court by Respondents) on substantially the same claims after the pendent state claims in DC No. 86-1136 had been dismissed without prejudice in federal court. That 1988 dismissal order was vacated in 1988 by the same federal judge.

Replacement George Kekuna on his First and Fourteenth Amendment claims and his 42 U.S.C. 1983 claims. Upon retiring in 1979 as a Colonel in the U.S. Army in which he had been promoted during 37 years from a private, Sussel obtained a job with the Respondent City and County of Honolulu's Oahu Civil Defense Agency ("OCDA") as a Communications Officer. He rose to the civil service position of Assistant Administrator and Operations Officer, which he relinquished in 1982 when he was appointed by Mayor Eileen Anderson (a Democrat) as Administrator of OCDA after being selected under open competitive civil service procedures.

Although his performance as Administrator was excellent, he was replaced on January 2, 1985 when the newly-elected Republican Mayor Fasi took office and appointed a Republican political patronage replacement for Sussel. Sussel was neither a Republican nor a supporter of Mayor Fasi. In doing so, the Mayor ignored Sussel's civil service rights by removing him without cause and without a prior 10-day written notice specifying the cause as required by the City Civil Service Law. The Mayor conspired with the City's Managing Director, the Civil Service Director, and Sussel's Replacement to replace Sussel to fulfill a political commitment. The conspiracy was implemented by reducing Sussel to a clerical role in OCDA but keeping his salary at the same level initially, and then harassing him in the hope that he would resign.

Sussel has persevered for over 6 years in attempting to recover his job. He initially appealed to the City Civil Service Commission ("Commission") which delayed his case from a 60-day period to one-year when it ruled 3 to 2 against him that he was not a civil service employee. He appealed to a state court which reversed that decision only to have the case remanded to the Commission, which then failed to hold hearings for another one year and five months during which it was discovered that the Commission had been biased since 1985 in favor of the Mayor who had stacked two members on the Commission in 1985 and who had a long- standing political and business relationship with the Chairman. Having been unable to obtain a prompt, fair hearing by an impartial Commission, Sussel sought to present all of his claims to an impartial jury in federal court in order to obtain reinstatement and compensation for lost salary and for his pain and suffering endured as a result of the exacerbation of his myofascial pain syndrome (which originated in part from four war wounds and injuries suffered in three wars) from the emotional stress due to the Respondents' political machinations.

Sussel alleged 17 separate claims including the following ones which were dismissed or denied by summary judgment by the District Court: (1) Deprivation of his civil rights in violation of 42 U.S.C. 1983 and deprivation of his Fourteenth Amendment rights to substantive and procedural due process and to freedom of political beliefs and association under the First Amendment; (2) Direct claims under the U.S. Constitution for violations of substantive and procedural due process, equal protection, and freedom of political beliefs and association; (4) A

conspiracy to violate his civil rights; (6) Breach of an employment agreement with the City; (7) Tortious breach of the covenants of good faith in his employment agreement; (9) Intentional and/or negligent misrepresentations in his hiring and removal; (10) Equitable estoppel, implied contract, and wrongful removal; (11) Intentional interference with contract relations; (12) Defamation; (13) Conspiracy to commit torts, wrongful conduct, and breach of contract. ER 1, 2ER 1-Ex.B.[3]

The case was scheduled for trial four times, the most recent of which was for March 14, 1989. The Court's March 3, 1989 Decision (Appendix C hereto and also herein referred to as "ER 535" at pages 50 to 53) and April 21, 1989 Order (Appendix D, ER 573) dismissed or granted summary judgment against Sussel on all of his claims in DC No. 86-1136 and on Claims 1, 2, 4, 6, 7, 9, 10, 11, 12, and part of 13 in DC No. 88-00375. The remaining pendent state claims in DC No. 88-00375 were remanded to State Court. ER 535-53.

B. Facts Pertinent to Petitioner's Questions

1. *Petitioner Was Removed For Political Reasons*

In February 1982, the City published an announcement for the Civil Service position of the Civil Defense Administrator. Sussel applied and was tested and interviewed by the City. Sussel was selected from the candidates who applied, was then appointed by Mayor Anderson on June 2, 1982, and approved by the State Director of Civil Defense. He relinquished the civil service position of Assistant Administrator and Operations Officer of OCDA when he accepted the Administrator's job. On December 2, 1982, he completed his probationary six-month period and was evaluated by the Managing Director who graded him "excellent" on all Performance Factors. In November 1984 he was again graded "excellent" on all Performance Factors.

On January 2, 1985, Fasi was sworn in as Mayor, D.G. "Andy" Anderson (who is unrelated to former Mayor Eileen Anderson) as the City's Managing Director, Fukuda as the City's Director of Civil Service, and Kekuna was sworn in as "Deputy Director-Designate OCDA" with the understanding that he had Sussel's powers to head OCDA. On January 7, 1985, Andy Anderson as Managing Director issued a Memo to all employees of OCDA to look for direction and guidance of OCDA from Kekuna at all times. On January 7, 1985, Kekuna informed the staff of OCDA that he had been appointed by the Mayor to take over and of how he would conduct certain matters. He told Sussel to turn over the official OCDA car. On January 8, 1985, Kekuna took over Sussel's office. On January 11, 1985, Kekuna issued instructions to Sussel and deprived him of additional powers.

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3 ER refers to the Excerpts of Record in DC 86-1136 and filed in the Ninth Circuit with Petitioner's appeal. 2ER refers to the Excerpts of Record in DC 88-00375 also filed in the Ninth Circuit. These two cases were previously consolidated in the District Court.

According to Anderson, "paper shuffling" was thereafter handled by the Civil Service Director to make the removal of Sussel and his replacement by Kekuna "legal." Anderson left it up to Director Fukuda to prepare the necessary paperwork. The paperwork consisted of a Position Description for Sussel which showed that he no longer had the duties that were vested in the Administrator under 6-104 of the City Charter. Addendum A-4 to Appellant's Opening Brief filed in the Ninth Circuit. It also included a Position Description for Kekuna, which showed that all of the Administrator's powers, duties, responsibilities, and authority were now assigned to Kekuna.

Mayor Fasi and Anderson relied on Director Fukuda to handle the processing of the change of Sussel's duties and powers. Fukuda testified that Sussel's "demotion" was due to *nondisciplinary* and *involuntary reasons*. As a result of his removal and the downgrade of his pay grade from EM07 to SR21 (9 pay levels), Sussel is not now receiving the salary raises that he would have received if he had remained as Administrator. He has been denied over $17,000 in pay raises.

Sussel was never given a prior 10-day written notice of his removal or demotion specifying the reasons for his demotion as required by Rule 10.3.c of the City's Civil Service Rules. Addendum A-5 to Appellant's Opening Brief filed on October 10, 1989 in the Ninth Circuit (all such references to Addendum "A-__" are to said Brief unless noted otherwise).

No notice specifying the reasons for his demotion was given because the City had no legitimate reason. The real reason for the demotion was to satisfy a political commitment from Mayor Fasi to Kekuna.

Sussel was demoted from the Civil Service position of Administrator of OCDA to make room for Kekuna to satisfy a political *commitment* from Mayor Fasi to his political supporter Kekuna. By their own admissions Respondents have ruled out incompetence as a reason for Sussel's removal. Addendum A-1 to Appellant's Petition for Rehearing and Suggestion For Rehearing In Banc filed August 21, 1990 in the Ninth Circuit (relating to admissions of Respondent Fasi's counsel made during oral argument on the appeal in this case on April 9, 1990). More importantly, Fasi's new Director of the Department of Civil Service, Respondent Fukuda, admitted that Sussel was demoted for *nondisciplinary* and involuntary *reasons*. Having ruled out both *disciplinary reasons* and *incompetence* for his demotion, Respondents' demotion of Sussel was based on political patronage reasons according to the following facts which must be construed most favorably for Sussel on the Summary Judgment motions. It was improper for the Ninth Circuit Court to attempt to weigh the facts or assess credibility to see if Sussel had presented "sufficient probative evidence" that he was demoted only because of *his* political affiliation, especially where the District Court made no findings of fact that Respondents had carried their initial burden of showing the absence of any genuine issue of fact or that any reason other than political

patronage was the cause of Sussel's demotion.

Fasi, as a Democrat, served and was elected as Mayor of Honolulu for three consecutive terms from 1969 through 1981. In November, 1980 he was defeated by Democrat Eileen Anderson who served as Mayor from January 2, 1981 to January 2, 1985. Fasi switched political parties to the Republican Party (the waning, minority party in the State of Hawaii) in 1984.[4] As a Republican he ran for and was elected Mayor for a 4th term in November 1984.

Sussel was not a Republican and he supported Democrat Eileen Anderson in 1984.

Mayor-elect Fasi on December 13, 1984 publicly announced the appointment of his new cabinet political appointees, including Respondent Kekuna, who was to get Sussel's job. Kekuna supported Fasi in both the 1984 and 1988 campaigns and he supported D. G. Anderson in his 1986 gubernatorial campaign. Sussel, a supporter of the Democratic candidate, was ousted to make way for Fasi's Republican supporter, Kekuna.

During the 1984 Mayoral campaign, *Kekuna was affiliated with the Republican Party as its Mililani District Chairman.* As such he arranged for Fasi supporters to regularly wave street campaign signs (which is the primary method of campaigning on a daily basis in Hawaii where posted signs and billboards were illegal in 1985). Kekuna also held such signs for Fasi in 1984. Kekuna organized a political meeting at his home in 1984 for the public to meet Fasi, who attended it. Kekuna made monetary contributions in 1985 for Fasi's campaign. Since 1984, Kekuna has helped conduct and arrange 10 political "pancake breakfasts" for D. G. Anderson's 1986 gubernatorial campaign.

Respondent Kekuna admits that on December 13, 1984 Fasi made a *commitment* to name him as head of OCDA. Respondent Anderson later confirmed the commitment. On December 15, 1984, Sussel, in response to Fasi's public announcement of all new prospective cabinet appointees, informed Fasi that he was a civil service employee and informed Fasi to leave him in his position. Fasi declined to do so even though he said that the present Civil Service Director did not agree with Fasi's belief that he could appoint whoever he wanted. Fasi cavalierly said, "... we'll see what the new one says." Fasi informed Sussel on December 15, 1984 that he had "made a *commitment*" to Kekuna. Sussel's union attorney informed Fasi in writing on December 21, 1984 that Sussel could not be discharged without proper cause. On November 30, 1984 Sussel had been graded "excellent" on all Performance Factors by the Managing Director.

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4 Respondent D.G. Anderson asked Fasi to become a Republican in 1984 since he felt it was the only way for both Fasi and the Republican party (of which Anderson was then a Republican National Committeeman) to win in the mayoral election. D.G. Anderson supported Fasi with volunteer work on his campaign committee and with a $2,000 donation. On January 2, 1985 Fasi appointed D.G. Anderson as his new City Managing Director (the City's second highest position).

On January 2, 1985, Fasi was sworn in as Mayor, Anderson as the City's Managing Director, Respondent Fukuda as the City's Director of Civil Service, and Kekuna as "Deputy Director-Designate OCDA" with the understanding that he had all of Sussel's powers to head OCDA. On January 7, 1985, Anderson issued a Memo to all employees of OCDA to look for direction and guidance of OCDA from Kekuna at all times. On January 7, 1985, Kekuna informed the staff of OCDA that he had been appointed by the Mayor to take over and of how he would conduct certain matters. He told Sussel to turn over the official OCDA car. On January 8, 1985, Kekuna took over Sussel's office. On January 11, 1985, Kekuna issued instructions to Sussel and deprived him of additional powers.

On January 2, 1985 D. G. Anderson informed Sussel that Mayor Fasi intended to proceed forward with his "*commitment*" to place Kekuna as head of OCDA. D. G. Anderson said Kekuna started exercising the duties and responsibilities assigned to Sussel as the Administrator of OCDA under Section 6-104 of the City Charter on January 2, 1985. Addendum A-4. Kekuna told Sussel on January 7, 1985 that Managing Director Anderson wants him down there at OCDA and the "mayor wants his tracks covered completely." D. G. Anderson was acting under the instructions of Mayor Fasi.

On January 11, 1985 Kekuna informed Sussel that (1) he was no longer to be the spokesman for OCDA and (2) he was not to respond to night emergencies for OCDA. Sussel has been relegated to the lowest subservient clerical role in OCDA; has been deprived essentially of all substantive duties; and has been subjected to emotional distress and pain and suffering as a result thereof.

Fasi's commitment to Kekuna was made as part of Fasi's policy to replace all of the cabinet heads. In light of Fasi's admitted *commitment* to Kekuna and Sussel's excellent performance as Administrator, the inference to be drawn in Sussel's favor is strong on a summary judgment motion that Sussel's demotion and replacement was a political reward for Kekuna's support as a Republican Party official of Fasi in 1984.

The Managing Director admitted that the substitution was a *policy* that he implemented for the Mayor. Fasi was a Republican, as was Kekuna. The replacement of Sussel with Kekuna, who had not been selected under civil service procedures and who was paid $10,000 a year more than Sussel had been paid for performing essentially the same job, was a political patronage appointment. Fasi said he wanted his appointee in as head of OCDA and he didn't care how the job got done. He disregarded Sussel's civil service status. Sussel's salary was retained at its former rate although his pay grade was reduced. Thus, the City is paying for two people now to do one job where it previously paid less money to Sussel than it is now paying Kekuna. Sussel had lost over $17,000 in pay raises by March 1989 due to his downgrade from an EM07 to SR21.

Fasi even stated in November 1984 that *he might give the edge to* those *who supported him* in his campaign in selecting new cabinet heads. In December 1984

after Fasi announced that he would appoint Kekuna to this position, the 1984 Civil Service Director Kunioka told Fasi that Sussel was a civil service employee. D. G. Anderson said that he "didn't really care" if Sussel was a civil servant since they had set out to fill the appointments. Fasi told Anderson and the others to find a way to get his appointee into the position and how they got him in was not important as long as they got the job done. Fasi said they carried out his instructions. Anderson repeatedly stated that he was carrying out the "policy" of the Mayor.

Fasi accomplished his goal by demoting Sussel and transferring all of his powers, duties, and authority (as set forth in Section 6-104 of the City Charter) to Kekuna. Addendum A-4. The commitment was fulfilled and non-Republican Sussel was removed from his civil service position as Administrator and replaced with a non-civil service Republican appointee who had supported Fasi. Construing these facts in the light most favorable to Sussel, the substantial or motivating factor for his demotion was based on political patronage reasons and summary judgment on his First Amendment claim and on his 42 U.S.C. 1983 claim should have been reversed for a jury to weigh the evidence at trial.

2. *Petitioner Has Long Been Deprived Of Due Process By The City's Biased Civil Service Commissioners*

D. G. Anderson informed a media representative in early 1985 that "we intend to win in the Civil Service Commission; we'll drag it out until Sussel and HGEA can't afford to continue and will quit."

On January 25, 1985 Sussel appealed his demotion to the Commission, which did not render a written decision until a year later on January 7, 1986. It decided (3 to 2 against him) that Sussel was not a civil service employee and it had no jurisdiction to hear his case. He appealed to the Hawaii State court which reversed the Commission on May 22, 1987 and found that he was a civil service employee and remanded the case to the Commission for further proceedings.

Respondents and the Commission originally delayed a hearing on Sussel's case from 1/25/85 until 10/9/85. It then delayed a written decision until January 7, 1986, contrary to the Commission's Rule 5.4.r that requires it to render a decision within 60 days from filing his appeal on January 25, 1985. Addendum A-6. Sussel then encountered over one year and five months of additional delays from the Commission after the entry of the May 22, 1987 Order of the state Court which remanded the case back to the Commission for further proceedings. Despite Sussel's prompt request by letter dated June 9, 1987 to Respondents' attorney that the Commission reschedule his remanded case, no further evidentiary hearings had been held by the Commission at the time of the appeal to the Ninth Circuit. Commissioner Dias was unable to explain why the Commission did not schedule a hearing on the remand.

The five-member Commission's January 7, 1986 Decision against Sussel was by a three to two vote. Of the two Commissioners who voted in Sussel's favor,

at least one (Salsbury) of them is no longer a Commissioner since her term has since expired and she was not reappointed by Mayor Fasi who criticized her in a December 26, 1985 letter for voting for Sussel. Mayor Fasi's blatant letters of intimidation to these two Commissioners were designed to influence the two dissenting Commissioners after their vote but prior to the entry of the Commission's January 7, 1986 written Decision. Failing to influence Salsbury, he simply did not reappoint her.

Of the three Commissioners (Tacazon, Dias, and Chairman Miyagi), who voted against Sussel, Tacazon and Dias were appointed to the Commission by Mayor Fasi in 1985 after Sussel filed his appeal to the Commission but before his appeal hearing commenced. Chairman Miyagi had been appointed several times to the Commission in the past by Mayor Fasi. Mayor Fasi with the help of the Corporation Counsel (who represented Fasi, the City, and the Commission) delayed the appeal hearing for 10 months and stacked the Commission with these two appointees (Dias and Tacazon) during the delay.

Although the City Charter prohibits political discrimination and influence in civil service matters, Commissioner Dias refused to consider this issue presented by Sussel in the October 1985 appeal hearing. Sections 6-302, 6-312.1 of Charter, Addendum A-4. Dias said that he did not intend to hear any "political laundry" or "political differences" aired at the hearing. The Commission's January 7, 1986 Decision did not even address the issue of whether there had been political discrimination. By not deciding that issue, the biased Commissioners and their Corporation Counsel ensured the protraction of the appeal hearing by compelling a remand even if the state court reversed its decision on the civil service issue.

A state court judge ruled on October 27, 1988 that Dias was *actually biased* against Sussel in 1985 and should be disqualified from hearing the remanded Sussel case. The Hawaii Supreme Court affirmed that decision on December 19, 1989. Addendum A-11 to Appellant's January 25, 1990 Answering/Reply Brief.

Chairman Miyagi is a personal friend of Mayor Fasi and Respondent Fukuda. He made political contributions in 1984 and in 1987 to Fasi by purchasing $2,000 in fundraising tickets. He also purchased fundraising tickets for Anderson for his gubernatorial campaign in 1986. He is a political supporter of both of those Respondents. He would have to rule against both of them in order to find in favor of Sussel on remand to the Commission. He is also biased for the City and Mayor Fasi because he is the president and 70% stockholder of MTL, Inc., a company that ran the City bus system since 1970 by negotiated contracts (non-bid) with the City. On October 27, 1988 a state judge ruled that *Miyagi had an "appearance of impropriety"* and suggested that he seriously consider disqualifying himself. He did not do so. Upon appeal to the Hawaii Supreme Court by Sussel of the lower court's decision not to disqualify Miyagi, the Hawaii Supreme Court on November 9, 1988 *stayed any further Commission proceed-*

ings pending the outcome of its decision on whether Miyagi should also be disqualified under the appearance of impropriety standard. The Hawaii Supreme Court disqualified him from further participation in Sussel's remanded appeal on December 19, 1989. Addendum A-11.

The Commission does not have the authority to address Sussel's non-civil service claims. Section 6-310 of the City Charter, Addendum A-4. The Commission says that it does not even have the authority to reinstate Sussel and to reassign his duties. The Commission did not even know what matters it was going to address on the remanded case and it was in an obvious state of uncertainty as to what authority it has to hear his remanded civil service claims. Judge Ideman denied abstention in this case and found that the: "Commission cannot provide the full relief that the plaintiff is seeking." Judge Keep had earlier agreed that she would not extend a limited stay of this case for the Commission to render a decision since she concluded that it could not adequately address Sussel's various claims.

Until January 1985 when Fasi was sworn in as Mayor, the Commission had a long-standing practice of being legally represented by the State Attorney General's Office at Commission hearings. Section 76-47 Hawaii Revised Statutes; Addendum A-2. Fasi's administration stopped that practice in early 1985 and required that a City Corporation Counsel advise the Commission, even though this created a clear conflict of interest since the Corporation Counsel's office was also defending the Respondents in front of the Commission.

On April 12, 1989, a state court found that, "... where there is a tribunal that is being biased by the advice of a biased legal counsel the Complainant in the matter is irreparably damaged. The Corporation Counsel is biased herein because of a conflict of interest in representing both the Commission and the Respondent appearing before the Commission." The state court enjoined the Commission and its members from using the Corporation Counsel in any proceedings in connection with Sussel's remanded case. The same Corporation Counsel had represented both the Commission and the Respondents in Sussel's initial appeal hearing in 1985 over Sussel's objections.

The policy behind the City's Civil Service system requires that the process be "free from coercive political influences" and that the selection and review process be an impartial one. Section 6-302 of the City Charter, Addendum A-4. It is the City's policy that all appointed officers (including the Civil Service Commission members) ". . . shall demonstrate by their example the highest standards of ethical conduct. . . . and shall faithfully discharge the duties of their office regardless of personal considerations." 11-101 of Charter, Addendum A-4. Section 11-103 of the Charter requires the disclosure by an appointed officer or employee of any "... interest as might reasonably tend to create a conflict with the public interest. . . ." Section 11-104 of the Charter requires that appointed officers shall not use their official positions to secure advantage to themselves. Addendum A-4.

The inference on summary judgment is strong that the two Commissioners who were not impartial had an interest or stake in insuring that Sussel lost or delayed the remand of his appeal to the Commission in order to promote their own biased purposes in supporting the Mayor's or the City's defenses or goals. Sussel has long been deprived of substantive and procedural due process by these biased Commissioners who delayed his case almost an additional 2 1/2 years (aside from the time that was spent in appeals at the state level).

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Causation Test under the First Amendment Which Compromises the "Sole Basis" Test With The "Substantial Factor" Test In This Case Involving a Political Demotion of a Civil Servant Raises an Important and Unresolved Question In Post-*Rutan* Cases Which Conflicts With Decisions of Other Courts of Appeals

Why should a public employee be entitled to a claim for deprivation of his First Amendment rights when the exercise of his freedom of speech was a substantial or motivating factor in his demotion, but he is not so entitled when the exercise of his political beliefs and association were the substantial or motivating factor for his demotion but not the sole basis for his demotion? The Ninth Circuit appeared to be confused as to the proper causation standard to be applied in this case involving a politically-motivated demotion.

Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 287, 50 L.Ed.2d 471, 484, 97 S.Ct. 568 (1977) held in a First Amendment freedom of speech case that initially the burden was properly placed upon a claimant to show that his conduct was constitutionally protected and that this conduct was a substantial or motivating factor in the adverse employment decision taken against him. Upon satisfying that burden, the district court then is required to determine whether the employer has shown by a preponderance of the evidence that it would have reached the same employment decision even in the absence of the protected conduct.

The *Mt. Healthy* causation test has not been applied by this Court in First Amendment cases involving adverse employment decisions based on political affiliation or support. The causation test that has been applied in *Elrod vs. Burns*, 427 U.S. 347, 349 (1976); *Branti vs. Finkel*, 445 U.S. 507, 517 (1980); and *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2739 (1990) has been to determine whether a public employee has been discharged or had an adverse employment decision taken against him "solely because" of his partisan political affiliation, non-affiliation or support. It is not clear whether the Ninth Circuit intended the *Mt. Healthy* test to apply only in employment cases involving freedom of speech and not freedom of political belief and association.

Sussel claimed a deprivation of his First Amendment rights of freedom of speech, political beliefs and association because he was removed for political patronage reasons. 2ER 1-Ex.B(p.17, 21). Without ever addressing his First Amendment claims, the District Court granted summary judgment on portions of Sussel's First and Second Claims (Appendix C at page 48a; ER 535-51) and dismissed all remaining claims in DC 86-1136 without prejudice. ER 535-46, 53. The Court remanded the remaining pendent state claims in DC 88-00375 and dismissed all federal claims. ER 535-48, 53; ER 573-5, 7, 8. Although Sussel had raised the First Amendment claims and moved for reconsideration of their dismissal, the District Court upheld its dismissal without comment on these claims. ER 573-p.7, 8.

When the Ninth Circuit issued its original Memorandum Opinion in this case on August 7, 1990, it contained no reference whatsoever to Findings of Fact, Conclusions of Law, or a Decision with respect to his claim for deprivation of First Amendment rights for a politically-motivated demotion. After Petitioner filed a timely Petition for Rehearing on August 21, 1990, the Ninth Circuit issued on December 6, 1990 its Order withdrawing the August 7, 1990 Memorandum disposition and filed in its stead the current December 6, 1990 Memorandum Opinion which contained two changes to its earlier Opinion.

One of those changes vacated in part and remanded in part the district court's decision with respect to pendent state claims upon which Summary Judgment had been granted against Petitioner. The other change involved, adding a sentence relating to Petitioner's political association claim.

In its December 6, 1990 Memorandum Opinion, the Ninth Circuit applied the *Mt. Healthy* test in addressing Petitioner's freedom of speech First Amendment claim as it had done in its August 7, 1990 Opinion. It then applied the *Elrod, Branti, Rutan* test with respect to Petitioner's political association claim by adding the following sentence to the third paragraph on page 9a:

> ". . . Further, Sussel has failed to present sufficient probative evidence that he was demoted *solely on the basis* of *his* political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990)." (emphasis added)

Appendix A at page 9a.

Thus, the Ninth Circuit's review of the evidence was initially based upon a causation test under which it required that Petitioner show that the demotion was solely based on his political affiliation. This strict test would prevent Sussel from proving that the substantial or motivating factor in his demotion was his non-affiliation with the Republican Party, his lack of support from that Party, and his replacement's affiliation and support of that party and/or the Republican Mayor.

In response to Petitioner's second Petition For Rehearing filed on December 21, 1990, the Ninth Circuit amended its December 6, 1990 Opinion and stated that:

". . . Further, Sussel has failed to present sufficient probative evidence that he was demoted *because of* his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2735 (1990.)" (emphasis added) Appendix B hereto.

The Ninth Circuit did not expressly state that Petitioner had failed to allege facts to support a claim that the exercise of his First Amendment rights of political belief and association was a substantial or motivating factor for his demotion. Nor did it reach the second level of inquiry under *Mt. Healthy* as to whether Petitioner would have been demoted in any event if his replacement had not been a supporter of and affiliated with the Republican Party and the Republican Mayor. No Findings of Fact or independent review of any evidence with respect to the politically-motivated demotion is contained in the Ninth Circuit's Opinion.

It did not apply the *Mt. Healthy* test. Nor did it finally apply the *Elrod* sole cause test. Since no Findings of Fact were entered by the Ninth Circuit after it changed its applicable test, it cannot be determined from its Opinion whether it conducted an independent review on the whole record as it is permitted to do in order to determine what the substantial or motivating factor was in Petitioner's demotion if it was not his non-affiliation with the Republican Party and his replacements affiliation and support of that party and its Republican Mayor. *Bose Corp. vs. Consumer Union of United States, Inc.* 466 U.S. 485 (1984). Since Petitioner is a civil servant, the Ninth Circuit would have to find some type of "just cause" under the Civil Service laws in order to conclude that political motivation was not the substantial or motivating factor for the demotion.

However, since it is admitted by Respondents that the demotion was not due to incompetence and Petitioner was performing at an excellent level one month before his demotion, the Ninth Circuit's failure to answer the second inquiry under *Mt. Healthy* in the affirmative that he would have been demoted even in the absence of the protected conduct, shows that the Ninth Circuit encountered confusion as to which test was applicable. If it intended to apply the *Mt. Healthy* test it did not adequately and fully apply it. The Ninth Circuit's second amended opinion on this point continues to focus only upon Petitioner's political affiliation and not on his non-affiliation with the Republican Party, his support of the Democratic mayor, and most importantly, his replacement's affiliation with and support of the Republican Party and the Republican Mayor (which was recognized in *Elrod* as an improper basis for discharge). 427 U.S. at 350-351.

For consistency, the test should clearly be that set forth in *Mt. Healthy*. If it had been applied in this case, the following facts when viewed in the light most favorable to Petitioner establish that the substantial or motivating factor in Petitioner's demotion was his non-affiliation and support of the Republican Party and its Mayor and his replacement's affiliation and support of that Party and its Mayor: (1) the Mayor was a Republican, (2) Sussel's replacement was a

Republican member, (3) Sussel's replacement was a Republican Party Chairman, (4) Sussel's replacement had supported Mayor Fasi in the 1984 election campaign, (5) Sussel was not fired, but instead demoted with his salary being kept at the same level as previously, (6) he was replaced by Republican Mayor Fasi's supporter whereas he had supported Democratic Mayor Eileen Anderson, (7) his replacement was paid more money for performing essentially the same job that Sussel had performed, (8) Sussel's job performance had been excellent one month before his demotion, (9) the City's Personnel Director admitted that Sussel's removal was not due to disciplinary reasons and was involuntary, (10) Mayor Fasi's attorney admitted in oral argument in the Ninth Circuit that he was not removed for incompetence, (11) Mayor Fasi pledged a *commitment* to Kekuna to give him Sussel's job as Administrator of OCDA, (12) Fasi's attorney also admitted that Sussel "was removed as part of a new administration coming in" and "[t]o the extent that when a president selects his own cabinet and that's a political reason, I guess you could equate that in this particular situation. . . .", and (13) Sussel had informed Mayor Fasi that he was a civil servant and could not be removed under the City Civil Service laws without just cause.

After Mayor Fasi changed parties and ran as a Republican in 1984, he received support from the Republican District Chairman, Kekuna, who held a political get-together at his house for Fasi. Kekuna also held road signs supporting Fasi. He provided monetary contributions to Fasi. Since 1984, he has helped conduct and arrange political pancake breakfasts for re-election efforts of Fasi. Kekuna was selected with the other patronage appointees who were publicly announced in December 1984 by Fasi. Sussel was not a Republican and he supported Democrat Eileen Anderson in 1984.

In 1984 Fasi and Anderson entered into a political agreement to support one another as Republicans with Anderson to support Fasi in the 1984 mayoral campaign. Fasi then supported Anderson in the 1986 gubernatorial campaign. Anderson initiated the request to Fasi to become a Republican in 1984 since he felt it was the only way for both Fasi and the Republican party (of which Anderson was then a Republican National Committeeman) to win in the mayoral election. They formed the mutual alliance and Anderson supported Fasi with volunteer work and a $2,000 donation. Kekuna supported both Fasi in the 1984 and 1988 campaigns and Anderson in the 1986 campaign. The agreements for political support and patronage which included the participation of Kekuna resulted in the exclusion of Sussel.

Fasi testified he might give the edge to those who supported him. He expected Fukuda and Anderson to figure out how he could "get control" to get his appointee in as head of OCDA. He accomplished that by demoting Sussel and transferring his authority to Kekuna in violation of multiple City and State laws of which he was well aware. Kekuna, Fasi, and Anderson each stated that a "commitment" was made by Fasi to Kekuna and that Fasi intended to pursue it.

The commitment was fulfilled, the conspiracy was implemented, and non-Republican Sussel was removed from his civil service position as Administrator and replaced with a non-civil service Republican appointee contrary to 6-104, 6-302, 6-312.1 of the City Charter, 128-13(1) H.R.S., and Article XVI, Section 1 and Article I, Section 4 of the Hawaii Constitution. Addendum A-4, 7, 8.

Other circuits have applied the *Mt. Healthy* substantial or motivating factor causation test in political demotion cases since *Rutan* was decided. *E.g. Green v. St. Louis Housing Authority*, 911 F.2d 65, 70 (8th Cir. 1990); *Laidley v. McClain*, 914 F.2d 1386, 1392 (10th Cir. 1990) (reviewing the record and drawing all inferences in plaintiff's favor, a genuine issue of fact existed as to whether a public employee's support of a losing candidate in a recent election was a substantial or motivating factor in her termination by the newly-elected District Attorney). Other courts, like the Ninth Circuit in this case, have shown less willingness to embrace the *Mt. Healthy* test in political deprivation employment cases. *See e.g., Neely vs. Mangum*, 396 S.E.2d. 160, 164 (W.Va. 1990); *Caraballo vs. Roman Hernandez*, 744 F. Supp. 389, 392 (D. Puerto Rico 1990).

Although the Ninth Circuit amended its Opinion on February 7, 1991 and deleted the words "solely on the basis", it did not recite any analysis or review of the evidence. Appendix B. Nor did it state that the *Mt. Healthy* test was applicable in *Rutan* political association demotion cases. Thus, it appears to be applying some type of hybrid or compromise of the two tests when it settled on the words "because of". The application of the correct test is an important question that should be clarified by this Court so that the confusion between the Circuits and State Supreme Courts can be avoided.

Even under the more stringent "sole basis" test (if that is the correct standard in post-*Rutan* cases), Sussel was deprived of his First Amendment rights since he was removed from his position solely because of political affiliation and support. Construing the facts in the light most favorable to Sussel, summary judgment should have been denied. The existence of his First Amendment claims alone established federal jurisdiction, thereby rendering the dismissal of DC 86- 1136 and the remand of DC 88-00375 erroneous. Dismissal under *Parratt v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986) is not applicable to First Amendment deprivation cases.

Respondent Fasi admitted through his counsel in oral argument in this case on April 9, 1990 that Sussel was removed for a "political reason" in this particular situation and not for incompetence.

> "JUDGE PREGERSON: If he were incompetent sufficient to fire him, why move him to another position and pay him the same amount of money?
>
> MR. NAKASHIMA: Well, Your Honor, the issue of incompetence, I think it is clear that *he was not removed from his position because of incompetence*. We have not said that.

JUDGE PREGERSON: *Why was he removed?*

MR. NAKASHIMA: Well, *this was a situation where the mayor*, the committee, the selection committee, had felt that because —*It was a situation where people were coming in. There's a new administration coming in.*

JUDGE PREGERSON: *So he was removed for political reasons.*

MR. NAKASHIMA: Well, *he was removed as part of a new administration coming in.* Mr. Sussel —

JUDGE PREGERSON: *And that's not for a political reason; is that what you're saying?*

MR. NAKASHIMA: Well, *Mr. Sussel was part of the cabinet from the previous administration. To the extent that when a president selects his own cabinet and that's a political reason, I guess you could equate that in this particular situation.* . . . " (emphasis added) Addendum A-1 to Appellant's Petition for Rehearing filed 12/21/90.

In *Elrod v. Burns*, 427 U.S. 347 (1976), the Court held that the practice of political patronage dismissals, where there is a wholesale replacement of cabinet-level public employees (like this case), violates the First Amendment protections of freedom of belief and association. 96 S.Ct. at 2689. It found no justification for patronage dismissals.

> "... The inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands belies this justification. And the prospect of dismissal after an election in which the incumbent party has lost is only a disincentive to good work. . . ." 96 S.Ct. at 2685.

It concluded that "... patronage dismissals severely restrict political belief and association . . . ." 96 S.Ct. at 2689

After the April 9, 1990 oral argument on this appeal, *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2739 (1990) held:

> "We hold that the rule of Elrod and Branti extends to promotions, transfer, recall, and hiring decisions based on party affiliation and support . . . ." (emphasis added).

The Supreme Court also stated:

> "We therefore determine that promotions, transfers, and recalls after layoffs based on political affiliation or support are an impermissible infringement on the First Amendment rights of public employees. . . ." Id. at 2737. (emphasis added)

Thus, the decision to demote Sussel (a) *if based on* his lack of or failure to affiliate with or support the Republican Party and its mayoral candidate or (b) *if based on* his replacement's (Kekuna's) political affiliation with or support from or of that Party and its mayoral candidate, would be irreconcilable with the First Amendment. Sussel neither supported nor was affiliated with that party or its political candidate Fasi whereas Kekuna was affiliated with and a supporter of both.

Sussel's removal as part of a wholesale replacement of former Democratic Mayor Eileen Anderson's administration when Republican Mayor Fasi took office in 1985 violates Sussel's First Amendment rights of belief and association under either the *Elrod* or *Mt. Healthy* test, whichever is applicable. Since Republican Fasi has judicially admitted through counsel that Sussel's removal (and replacement by a non-civil service Republican District Chairman) was *not for incompetence* but was solely pursuant to a *wholesale replacement* of the former Democratic mayor's *cabinet*, summary judgment on this claim and, in turn, on the 42 U.S.C. Section 1983 claim must be reversed.

In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), the Court denied defendant's summary judgment where a college refused to renew plaintiff's teaching contract as a reprisal for his exercise of constitutionally protected speech in publicly criticizing his superiors on matters of public concern. Sussel, as Administrator, delivered a letter on January 2, 1985 to Mayor Fasi (immediately after he was sworn in) outlining areas of jeopardy to the public safety on civil defense matters. On January 7, 1985, Anderson issued a memo purportedly using Sussel's protected January 2, 1985 letter as a basis for his removal. On January 7th Anderson stated to the press that the conflict between state and City Civil Defense (stated in Sussel's 1/2/85 letter) was "the main reason Fasi wanted Sussel out" whereas, he said on January 2nd that Sussel could keep his title, salary, and office. Anderson later denied that the City/State issue had anything to do with Sussel's ouster. Sussel exercised his right of freedom of speech in communicating a matter of public concern to Mayor Fasi on his first day in office. Fasi and Anderson's inconsistent effort to cover up Fasi's commitment to Kekuna and to justify Sussel's removal based on that letter raises a genuine issues of material fact if not under the freedom of speech clause of the First Amendment, then under the political association clause.

The Ninth Circuit stated in its Opinion that the timing of this letter being written several weeks after Fasi announced his intention to place Kekuna in the management position at OCDA shows that his exercise of his freedom of speech in writing the letter was not a substantial or motivating cause in his demotion. Appendix A (p.9a). Assuming, arguendo, the Ninth Circuit is correct on this finding, it evinces the extent to which the Mayor and his managing director would go to try to dream up reasons to justify his removal in order to cover up the commitment to Kekuna. The correct causation test to be applied in political

motivation cases subsequent to *Rutan* should be clarified by this court so that inconsistencies are eliminated and the facts of this case can be applied to the correct standard.

II. Petitioner Was Deprived of Due Process By Two Biased Civil Service Commissioners Without Whose Votes Petitioner Would Have Won

Due process requires that a party even in administrative hearings receive a fair hearing by a fair tribunal. *Gibson v. Berryhill*, 411 U.S. 564, 579, 36 L.Ed.2d 488, 93 S. Ct. 1689 (1973); *Goldberg v. Kelly*, 397 U.S. 254, 271, 25 L.Ed.2d 287, 90 S. Ct. 1011 (1970); *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 106 S. Ct. 1580 (1986); *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975); *In re Murchison*, 349 U.S. 133, 136 (1955);

The Ninth Circuit stated that,

> "... Sussel also has an established post-deprivation procedure, with which he is familiar; that Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process...." Appendix A (p.9a)

The Ninth Circuit's Opinion is in direct conflict with the above authorities since a post-deprivation procedure before biased Commissioners necessarily constitutes a violation of due process, especially in cases such as this before an administrative agency where the result would be reversed if the biased commissioners are removed from the count. The fact that there may be an appeal procedure from the Commission proceedings does not render the commission proceedings constitutionally acceptable where there are biased Commissioners. *Gibson v. Berryhill, supra; Ward v. Monroeville*, 409 U.S. 57, 34 L.Ed.2d 267, 93 S. Ct. 80 (1972).

The Ninth Circuit's Opinion and the District Court's Decision fail to address the following issue appealed by Sussel. Opening Brief (p. 27). Sussel was deprived of due process because the Civil Service Commission was not impartial in hearing his case in 1985. The Hawaii Supreme Court on December 19, 1989 held that 2 of the 5 Commissioners were enjoined from further participation in Sussel's civil service appeal because of actual bias and an appearance of impropriety, respectively. Addendum A-11 to Appellant's Answering/Reply Brief filed on January 25, 1990. Consequently, dismissal of Sussel's Due Process claim should be reversed as a matter of law.

A fair tribunal did not decide Sussel's case as he was entitled. This is a fundamental deprivation of due process. The two disqualified Commissioners were the tying and deciding votes in 1985 when they voted against Sussel 3 to 2. Without their votes, Sussel's hearing in 1985 would have been 2 to 1 in his favor.

Addendum A-11. Based on these undisputed facts in light of the Hawaii Supreme Court's Opinion, a deprivation of due process occurred in 1985 and summary judgment against Sussel must be reversed on his Second Claim.

The Commission repeatedly violated its own rules in 1985 and 1987 to Sussel's detriment. Fasi wrote to intimidate one Commissioner and did not reappoint her. The attorney representing the Commission also represented the Respondents and has been disqualified. Mayor Fasi refused to proceed forward with the 1985 hearing until he had appointed new Commissioners. These multiple violations of rules can only be attributable to the lack of an impartial fact-finder in this case and to Mayor Fasi's manipulation of a civil service system that enabled him to appoint Commissioners who are partial to him and who are then permitted to rule on a case in which he is the primary defendant. Such a system as applied to Sussel deprived him of due process and an opportunity for a fair hearing, whether it be a pre- or post-deprivation hearing.

The District Court assumed that further Commission proceedings would provide adequate relief for Sussel. Yet, the Commission stated that it did not have the authority to reassign his duties and future proceedings cannot cure the prior constitutional deprivation by the Commission itself.

III. A Two Year And Three Month Hearing Delay And Other Procedural Abnormalities Which Were Caused By Biased Commissioners And The Mayor Violate a Demoted Public Employee's Right to Procedural Due Process

The Court granted summary judgment against Sussel on his substantive due process claim (ER 535-p.25) and dismissed without prejudice his procedural due process claims. ER 535-p.46 to 47. Genuine issues of material fact exist to entitle him to present these claims to a jury.

Procedural due process guarantees a dismissed public employee, who has a property or liberty interest in his job, a pre-termination hearing allowing "a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." It must also include oral or written notice of the charges against the employee, an explanation of the employer's evidence, and an opportunity for the employee to present his side of the story. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546 (1985).

Section 76-46 Hawaii Revised Statutes (Addendum A-2 to Appellant's Opening Brief) and Rule 10.3.c (Addendum A-5) required that Sussel be given a 10-day prior written notice stating the specific reasons for his demotion. Respondents failed to comply with this civil service and procedural due process requirement. Section 76-30 Hawaii Revised Statutes and Rule 10.3.a provide that he could only be removed or demoted for cause and he was entitled to employment during "good behavior." No cause or prior notice was given to Sussel.

The Ninth Circuit and District Court tried to distinguish *Loudermill* on the grounds that a public employee who is terminated is entitled to prior notice and a prior opportunity to respond, but one who is *demoted* is not. Appendix A hereto (page 8a-9a); Appendix C (page 30a-31a). That distinction affords a public employee who is discharged greater procedural due process rights than one who is demoted even though both employees have the same protected property right under the same state law. This cannot be right especially where the effect of the demotion removed Sussel from the leadership of a vital County Civil Defense Agency. Even Mayor Fasi admitted that the lack of a "clear chain of command" at OCDA jeopardized the public safety.

Loudermill stated that, "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by . . . state law . . . .'" 470 U.S. at 538-39. Sussel, as a civil service employee, possessed property rights in continued employment free from demotion unless cause existed and said 10-day prior notice specifying the cause was given. Civil Service Rules 10.3.a, b, c; 6-302 of City Charter; Addendum A-4; *In re Appeal of Harper*, 52 Hawaii 313, 318, 475 P.2d 53 (1970); *MacKenzie v. Gleason*, 30 Hawaii 477, 484-85 (1928). The District Court acknowledged Sussel's property right when it stated,

> "In this case, we have claims of negligent or intentional violations . . . of plaintiff's procedural due process rights relating to *his property interest (freedom from demotion except for cause).* . . . (emphasis added) Appendix C (p.42a)

The Ninth Circuit's Opinion inexplicably states (Appendix A, p. 8a) that there is a dispute "whether Sussel was demoted or merely downwardly reallocated" and that the latter process is not protected by due process. However, the Ninth Circuit affirmed the District Court on all Cross-Appeal issues including the demotion one. Yet it completely overlooks the District Court's express rejection of the downward reallocation defense and its legal conclusion that Sussel had been *demoted*. Appendix C at pages (fn. 4) 17a-18a,26a; Addendum A-2 to 12/21/90 Appellant's Petition For Rehearing. The District Court Judge expressly stated that Sussel was demoted when he verbally rendered his March 3, 1989 Decision,

> ". . . The Court did a rather exhaustive study of the history and background of the matter, the Revised Charter of the City and County of Honolulu, determinations of the City Corporation Counsel. The Court has reviewed the decision of Judge Honda, and I won't go through in great detail here this Court's reasoning, because it is set forth in the written order which you receive later this morning. . . .
>
> And, by the way, in the body of the Court's order you will see that there has been some allegation or question raised by the defendants as to whether this defendant was, in fact, de-

moted. *The Court finds as a matter of law that the actions* taken by the defendants in this case *amounted to a demotion, whether it be called something other than that*, but, *in fact, it was a demotion*." Addendum A-2 (p.8-10) attached to Appellant's Petition for Rehearing filed on December 21, 1990. (emphasis added).

The District Court Judge in his March 3, 1989 written Decision stated,

> "*Plaintiff was 'demoted'* from Executive Assistant I to Administrative Assistant II on January 11, 1985. During this time, Plaintiff was stripped of all authority and responsibility although his base salary was protected. Plaintiff contends however, that he has not received approximately $17,000 in pay increases which he would have otherwise received due to the change in his salary classification." ER 535-4 to 5. (emphasis added)

The Court further stated in its written Decision,

> "Accordingly, *it is clear*, and *the court so finds*, that the position of Administrator of OCDA was a civil service position at all times relevant to the subject matter of this case. Therefore, plaintiff was entitled to a 10-day written notice of *his demotion* (Revised Rules of the Civil Service Commission, Rule 10.3-c) and an opportunity to challenge *the demotion* decision (Rule 10.5). Further, he was entitled to be *demoted* only for cause (Rule 10.3-a)...." ER 535-17 to 18. (emphasis added)

Judge Ezra elaborated on his demotion finding in footnote 4 of his Decision and did not accept Respondent's reallocation defense.

> "*The City contends that plaintiff was not 'demoted'*. He was 'reclassified' from Executive Assistant I to Administrative Assistant II, retaining the same salary level and remaining in the same department: OCDA. *Therefore, it reasons, it was a 'downward reallocation', not a demotion.* That being the case, under this reasoning, plaintiff was entitled to no notice or hearing under the civil service rules.
>
> It is not disputed that plaintiff was stripped of his duties and benefits as Administrator of OCDA and re-classified to a salary position which deleted some of the salary increases to which he would otherwise have been entitled. This was accomplished by "red-circling" his salary: i.e., leaving plaintiff at a salary level higher than that usually accorded an Adminis-

> trative Assistant II. Plaintiff lost his title, his authority and his office. On these undisputed facts, this court finds that plaintiff was in fact "demoted." ER 535-4 and 5 (fn.4).

The Respondents cross-appealed this issue but it was not reversed. Thus, Sussel was demoted. That is no longer an issue and demotion is an interest protected by the due process clause under State law. Rule 10.3.c of the Civil Service Commission, Addendum A-5 to Appellant's Opening Brief. The Court's misstatement that this is still an issue should be corrected.

Loudermill did not limit its holding to terminated public employees. The due process right to prior written notice of discharges applies to tenured public employees who are demoted when the County law gives them the same rights as discharged employees. The failure to give it is a "distinct due process violation" and "not an alternative theory supporting the same relief." 470 U.S. at 547, n.12. This failure to give a 10-day prior notice before demoting Sussel is a procedural due process violation that has already occurred. That violation forms one of the bases for Sussel's procedural due process claims. Even if under a balancing test Sussel were not entitled to a pre-termination hearing, he is still entitled to the prior written notice. *Loudermill* does not permit a District Court to diminish the minimum procedural due process requirements established under county law.

The deprivation of Sussel's liberty and property interests without due process cannot be cured by the quality of post deprivation procedures. *Fetner v. City of Roanoke*, 813 F.2d 1183, 1186 (11th Cir. 1987); *Lew v. Kona Hospital*, 754 F.2d 1420, 1424 (9th Cir. 1985). Since he was already deprived of due process by not receiving prior written notice, he did not have an adequate opportunity to present reasons why the proposed action should not be taken. Procedural due process entitles a party to an unbiased tribunal and notice of the proposed action and grounds asserted for it together with an opportunity to present reasons why the action should not be taken. *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Sussel alleged another distinct procedural due process violation which consists of the Commission's unreasonably prolonged delay in hearing his appeal. The delay was from 1/25/85 to 1/7/86. It took the Commission that long to decide, contrary to its rule requiring a decision within 60 days. Addendum A-6. The District Court and the Ninth Circuit did not address this first delay. ER 535-44. The delay was lengthened by the Commission when the case was remanded on May 22, 1987 but it did not hold any hearings for 1 year and 5 months thereafter. This total delay consists of 2 years and 3 months (excluding the 1 year and 4 months of appeal time to Judge Honda from 1/86 to 5/87 and the 60 days provided in the Commission's Rules). The District Court and Ninth Circuit found that the post-January 7, 1986 delays were the "result of legitimate appeals by the parties." Appendix A (p.9a), Appendix C (p.43a). This finding is inconsistent with the facts, overlooks the one year delay caused by the Mayor and/or his biased

Commissioners before any appeal was taken, and raises a genuine issue of material fact for trial.

Sussel pressed the Commission for a prompt hearing in 1985 and again in June 1987 before he fully knew of the Commission's bias. The Commission's attorney in 1987 said they would schedule his hearing pursuant to their rules but failed to explain their failure to do so. Construing the facts in the light most favorable to Sussel, this lengthy delay which was prolonged by the biased Commission and its biased Corporation Counsel rises to the level of constitutional proportions. No appeals even occurred from the Commission during this second delay period. The appeal occurred between January 1986 and May 22, 1987. That time period has been excluded from the remaining collective 2 years and 5 months that the case sat before the Commission with no hearings being conducted. The entire process of Sussel's hearing is tainted by bias, conflicts of interest, and repeated foot-dragging.

In *Loudermill*, the administrative hearings were completed and a decision rendered in 9 months. The delay that Sussel has confronted is a year and 6 months longer than that. *Loudermill* involved no questions of bias, conflicts of interest, and bad faith failure to follow the agency's own rules. Sussel has presented genuine issues of fact showing the delays were intentionally caused by the biased Respondents.

A due process deprivation of a property and a liberty interest exists when viewing the facts in the light most favorable to Sussel since: (1) state law afforded him a 10-day prior written notice of his demotion and it was not provided, (2) he sought to have a full-blown evidentiary hearing on the question of his removal but the hearing was held before a Commission that was biased and would not fully address his claim of political discrimination, (3) two pivotal Commissioners on a 3 to 2 vote were not impartial and have been disqualified, (4) the Commission and the Respondents delayed the Commission proceedings 2 years and 3 months beyond the required 60 days, (5) the Respondents and the Commission were represented by the same lawyers (who have since been disqualified), (6) numerous rules of practice of the Commission were not followed, and (7) just cause was required for a demotion but the demoting authority admitted that its actions were taken for "non-disciplinary reasons." Summary judgment on the procedural due process claims was erroneous.

IV. A Public Employee Who Is Stigmatized In His Demotion Is Deprived of a Liberty Interest Under the First Amendment Where His Post-Deprivation Hearing Is a Sham Orchestrated by Biased Commissioners Appointed by The Party Being Sued

Liberty, in public employment, includes First Amendment rights of political expression, association, and penumbra rights of privacy and reputation. It is a deprivation of the liberty interest in political expression to dismiss a public

employee without due process for expressing political opinions. *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Bueno v. City of Donna*, 714 F.2d 484 (5th Cir. 1983). It is a deprivation of liberty to accomplish a discharge in a manner that injures the public employees' reputation. *Doe v. United States Department of Justice*, 753 F.2d 1092, 1102-03 (D.C. Cir. 1985). Liberty, in the public context, includes First Amendment rights of reputation. *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969) (reputation is a liberty interest.) A communication by an employee involving matters of public concern is a protected liberty interest for which he cannot be discharged without due process. *Rankin v. McPherson*, 483 U.S. 378, 97 L.Ed.2d 315, 107 S.Ct. 2891 (1987); *Eiland v. City of Montgomery*, 797 F.2d 953 (11th Cir. 1986); *Berdin v. Duggan*, 701 F.2d 909 (11th Cir. 1983), *cert. denied*, 464 U.S. 893 (1983).

Sussel's January 2nd letter notified the newly-elected mayor of jeopardy to the public safety in civil defense caused by the State Civil Defense Department's intransigence and lack of cooperation with OCDA. Fasi and Anderson never met with Sussel to be briefed on this but attempted to use it to justify his removal (which had already started at noon on January 2nd) on January 7th by stigmatizing his professional reputation by implicitly blaming the poor City/State relations on Sussel and indicating to the press that the solution to the problem was his removal. Fasi's use of the January 2nd letter deprived Sussel of a liberty interest and freedom of speech where he was stigmatized for communicating a matter of public concern to the mayor. Fasi and/or Anderson released the January 7th Memo to the press.

The Administrators of two other County Civil Defense Agencies in Hawaii experienced the same civil defense problems with the State Civil Defense in 1985 as Sussel did. The common denominator for the poor relations was certain personnel at the State Civil Defense, which Fasi did not even bother to ascertain when he failed to be briefed by Sussel. Civil defense matters are a matter of vital public concern. Sussel had a protected free speech obligation to communicate this to Mayor Fasi. Fasi violated Sussel's free speech rights by then stigmatizing him in the effort to remove him when he knew there was no just cause in light of Sussel's excellent performance as Administrator as he was evaluated a month earlier.

An employee who has been stigmatized in or as a result of the process of discharging him, where the stigmatizing charges were made public, and who was denied a meaningful hearing to clear his name, alleges a sufficient liberty interest to implicate the Fourteenth Amendment. Although Respondents contend that Sussel was removed for "non-disciplinary" reasons, Fasi and Anderson attempted to justify his removal (and to cover-up Fasi's real motive of appointing his political appointee) by making additional stigmatizing statements damaging to his reputation in connection with his removal. Those statements, which were made after Kekuna's appointment, include Fasi's statement 9 months later in October 1985

on public radio that Sussel "botched Hurricane Iwa" (which had occurred three years earlier) and that Sussel had stated that the Director of the State Civil Defense was "incompetent." These statements were denied as not being true or not having been made by Sussel. Kekuna prepared a derogatory and defamatory "confidential memo" on January 31, 1985 that was distributed to the press by Fasi in February 1985 and that alleged Sussel isolated himself from his staff members, failed to adequately upgrade emergency preparedness plans, failed to communicate with staff members on crucial matters, and gave preferential treatment to certain staff. Sussel denied these allegations. But Sussel was deprived of a name-clearing hearing to clear these charges in 1985 since one biased Commissioner refused to consider political issues and Sussel was not afforded a fair hearing with impartial Commissioners.

Where the purported reasons given for a discharge are false and have harmed the reputation and standing of a party in the community, a deprivation of Sussel's constitutional rights exists so as to entitle him to damages even though he was only demoted and not discharged. *Siegert v. Gilley*, 59 U.S. Law Week 4465 (May 23, 1991); *Wells v. Doland*, 711 F.2d 670 (5th Cir. 1983); *Eames v. City of Logan*, 762 F.2d 83, 86 (10th Cir. 1985). The employee need not prove falsity of the information, but only needs to allege falsity, as Sussel has done. *Brandt v. Bd. of Coop. Ed. Serv.*, 820 F.2d 41, 43-44 (2d Cir. 1987) (error in granting summary judgment for employer). There are substantial genuine issues of material fact which entitle Sussel to present these First and Fourteenth Amendment claims to a jury.

V. A Civil Servant Is Denied Substantive Due Process When He Is Demoted For No Lawful Reason

The substantive due process entitlement requires that the government not take action that is wholly unrelated to legitimate public interests. Sussel was demoted for reasons of political discrimination since he was not a supporter of Mayor Fasi whereas Kekuna was. Construing the facts in the light most favorable to Sussel, the City's demotion was wholly unrelated to any legitimate public interest and violates the Hawaii Constitution and 6-312.1 of the City Charter. Addendum A-4, 7. Substantive due process scrutiny of a government action involves a case-by-case balancing of the nature of the individual interest infringed and the importance of the government interest furthered. *Beller v. Middendorf*, 632 F.2d 788, 807 (9th Cir. 1980).

In *Major v. Hampton*, 413 F.Supp. 66 (E.D. La. 1976), a substantive due process analysis was applied to the discharge of an IRS official. There was no evidence that plaintiff's actions were calculated to arouse, or aroused, odium for the employee or the IRS and the court determined that there was no rational basis for the government's conclusion for discharge. In *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969), the court was also unable to find a sufficient rational connection

between plaintiff's off-duty conduct and the "efficiency of the service" to justify his dismissal. In *Schaper v. City of Huntsville*, 813 F.2d 709, 715 (5th Cir. 1987), the court stated that a substantive due process analysis was recognized as appropriate for an arbitrary deprivation of a property interest in a job. *Accord, Eckmann v. Board of Education of Hawthorn*, 636 F.Supp. 1214, 1218 (N.D. Ill. 1986). In *Johnson v. Jefferson County Board of Health*, 662 P.2d 463 (Colo. 1983), the court vacated the lower court's judgment where it failed to weigh a discharged public officer's free speech rights against the County's interest in discipline and efficiency.

Sussel has been deprived of his substantive due process rights since there is no rational reason for his demotion. Construing the facts in the light most favorable to him, he was removed without just cause, which is contrary to the civil service laws. Fukuda said he was demoted for nondisciplinary reasons. Political discrimination is not a rational basis for his demotion, since it violates the law. 76-44 H.R.S.; 6-312.1 and 6-302 of City Charter; Addendum A-2, 4. In light of his excellent performance record, there was no legitimate reason to remove him. This substantive due process claim should be presented to the jury and it also prevents dismissal of his 1983 claim.

VI. Dismissal of Constitutional Claims and 42 U.S.C. 1983 Claims Under Parratt Was Erroneous

Dismissal of procedural due process claims under Parratt (ER 535-46) was erroneous since he still has First Amendment claims and was deprived of a liberty interest and substantive due process. Sussel presented substantial evidence showing that the Respondents' actions were intentional and not "random." Construing the facts in the light most favorable to him, the Court must conclude that the Respondents' conduct was deliberate, since the District Court found that fact issues exist regarding the parties' intent and the reasonableness of their conduct on the issues of qualified immunity and punitive damages. ER 535-28, 23.

Parratt "does not apply to intentional deprivations of liberty that rise to the level of substantive due process violations." *McRorie v. Shimoda*, 795 F.2d 780, 785 (9th Cir. 1986). Sussel was deprived of a liberty interest and substantive due process.

Punton v. City of Seattle, 805 F.2d 1378 (9th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987), which was relied on by the District Court is distinguishable since its Commission was impartial and did not delay proceedings, whereas, Sussel did not complete his proceedings because he was deprived of due process in the course of pursuing his rights and was compelled to file a federal court action.

The *Parratt—Hudson Doctrine* only applies in cases involving "a random and unauthorized act by a state employee.... not a result of some established state procedure." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 435-36 (1982).

Where the challenge is to "an established state procedure", the availability of a post-deprivation judicial hearing normally does not satisfy procedural due process. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

Conduct is not random and unauthorized when it is pursuant to a de facto governmental policy. *Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985), *cert. denied*, 106 S. Ct. 3333 (1986). There was a de facto governmental policy established by the mayor to remove Sussel and substitute Kekuna. Conduct is not random and unauthorized when the deprivation of rights is foreseeable from the position of one who possesses delegated authority to grant a hearing. *Patterson v. Coughlin*, 761 F.2d 886, 892 (2nd Cir. 1985); *Grecko v. Guss*, 775 F.2d 161 (7th Cir. 1985). Conduct is not random and unauthorized when a contested decision is pursuant to a deliberate decision of an official with power to set policy. *Wolfenbarger v. Williams*, 774 F.2d 358 (10th Cir. 1985); *Lavicky v. Burnett*, 758 F.2d 468 (10th Cir. 1985). Conduct is not random and authorized when it is pursuant to a deliberate though unauthorized practice or policy. *Piatt v. MacDougall*, 773 F.2d 1032 (9th Cir. 1985); *Hicks v. Feeney*, 770 F.2d 375 (3rd Cir. 1985). A deliberate policy decision was made by Fasi to remove Sussel. The deprivation was foreseeable since he established his policy at least two weeks before he was sworn in as mayor. The policy, though unauthorized under the civil service laws, was deliberately set and under *Piatt* that is sufficient to establish conduct that is not random and unauthorized. "By definition, a conspiracy . . . cannot be a random act, even if it was accomplished without the endorsement of the state governmental apparatus." *Bretz v. Kelman*, 773 F.2d 1026, 1031 (9th Cir. 1985). Fasi's actions and the other three City officials who implemented his policy come within the conduct that is not random and unauthorized since even the Court concluded that sufficient facts exist to maintain 1983 claims against the Respondents in their individual capacity. ER 535-22.

Parratt is inapplicable to a deprivation of a liberty interest. *Hewitt v. City of Truth or Consequences*, 758 F.2d 1375, 1379 n.4 (10th Cir. 1985). *Parratt* does not apply to violations of substantive constitutional rights, but is limited to violations of procedural due process. *Gilmere v. City of Atlanta*, 774 F.2d 1495 (11th Cir. 1985); *Robins v. Harum*, 773 F.2d 1004 (9th Cir. 1985); *O'Quinn v. Manuel*, 773 F.2d 605 (5th Cir. 1985). With respect to substantive constitutional rights, "the constitutional violation is complete at the moment when the harm occurs." *Gilmere*, 774 F.2d at 1500. Applying *Parratt* to alleged violations of substantive constitutional rights would "write *Monroe* out of existence, a result clearly not intended by *Parratt*." *Augustine v. Doe*, 740 F.2d 322, 326 (5th Cir. 1984).

> "*Parratt v. Taylor* is not a magic wand that can make any section 1983 action resembling a tort suit disappear into thin air. . . . *Parratt* applies only when the nature of the challenged conduct is such that the provision of predeprivation procedural safe-

guards is impracticable or infeasible." 740 F.2d at 329.

Although the Court found that genuine issues of fact existed on the issue of qualified immunity (ER 535-23), the Court dismissed the 1983 and conspiracy claims against the individual Respondents (Appendix D at pages 53a,54a; ER 573-4, 5) and against the City (ER 535-21). The Court had initially found that, "... Plaintiff has asserted facts sufficient to maintain his 42 U.S.C. 1983 claim against those defendants sued in their *individual* capacities." ER 535-22. It denied summary judgment on that issue against the individual Respondents, but then reconsidered and dismissed those claims against the individual Respondents under *Parratt*. Reversal of the *Parratt*-based dismissal against the City should result in reversal against the individual Respondents. The Court dismissed the 1983 claim by stating that Sussel failed to prove a City policy for his removal. ER 535-20. It stated:

> "... No credible evidence has been submitted ... to suggest that the City, through its City Council or otherwise, has either adopted or tacitly approved the acts of its officers which may have contravened City rules, or state and federal law." ER 535-21

However, approval by the City Council was not required for removal of the Administrator of OCDA under 6-104 of the City Charter. The Mayor alone had the removal power. 6-104, 5-103(a); Addendum A-4.

Monell v. New York City Department of Social Services, 436 U.S. 658, 694 (1978) stated that, local governing bodies can be sued directly under 1983 where the unconstitutional action implements a policy statement or decision officially adopted or promulgated by those "whose edicts or acts may fairly be said to represent official policy." The "official policy" can be based on long-standing custom but does not have to be. Official policy may also be based on a single decision of policy makers. *Pembaur v. City of Cincinnati*, 106 S.Ct. 1292, 1298 (1986); *Reed v. Schneider*, 612 F.Supp. 216, 222 (E.D.N.Y. 1985).

In *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983), the court reversed the dismissal of plaintiff's civil rights action against a municipal corporation and held that she had presented sufficient evidence that her single unlawful discharge resulted from an "official policy" of the municipal corporation since:

> "A single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' ... may support an action against the municipal corporation. .... *Where an official has final authority over significant matters involving the exercise of discretion, the choices he makes represent government policy.... An official has final authority*

> *if his decisions, at the time they are made, for practical or legal reasons constitute the municipality's final decisions. . . .*" (emphasis added) 710 F.2d at 45.

A single act of a mayor may constitute official municipal policy which will render both the mayor, individually, and the City liable to the injured plaintiff. In *Hollins v. Powell*, 773 F.2d 191 (8th Cir. 1985), it was held that a mayor had violated the constitutional rights of the plaintiffs by having them arrested when they refused to refrain from meeting as the City's Land Clearance and Housing Authority when the Mayor sought to replace them. In *Burkhart v. Randles*, 764 F.2d 1196, 1198 (6th Cir. 1985), the court reversed a directed verdict in favor of a County since the evidence established that the defendant represented the County as the highest ranking official in the Office of the Clerk and was solely responsible for executing the policies and operation of the office. Her actions of firing two employees-at-will were not subject to approval by any other persons in the County. In *Wilson v. Taylor*, 733 F.2d 1539 (11th Cir. 1984), the denial of a city defendant's motion for directed verdict on the plaintiff's First Amendment substantive claim was proper where a police officer had been fired without procedural due process and in violation of his First Amendment right of association. The court concluded that the Chief of Police had the final or ultimate authority within the local government to make the decision to fire despite the existence of an appellate process.

In *Hammond v. County of Madera*, 859 F.2d 797, 803 (9th Cir. 1988), the Court reversed a dismissal of a civil rights claim and held that a county was liable under 1983 where the county board of supervisors was authorized to make policy in the area of rights of way and road acquisitions. The court stated in that for an official's act to constitute municipal policy, it must be demonstrated that the policy-making authority for a particular city function was delegated to that official and that whether an official has the responsibility for making law or setting policy is a question of state law. In *Rebel Van Lines v. City of Compton*, 663 F.Supp. 786, 789 (C.D. Cal. 1987), the court denied a city's motion for summary judgment on a 1983 claim where a single decision was made by a city not to sell real property to plaintiff. Accord, *Bartholomew v. Fischl*, 782 F.2d 1148, 1153 (3rd Cir. 1986). In *Williams v. City of Valdosta*, 689 F.2d 964, 969 (11th Cir. 1982), the court reversed a grant of a city's motion for judgment notwithstanding a verdict in a case where a fire fighter sued under 1983 alleging that the city had abolished his job and demoted him because of his first amendment activities. The court stated:

> "... Here, City Manager Horton is vested with final responsibility under the city's personnel ordinance for the demotion of City employees. Thus, his act of demoting Williams may fully be said to represent official city policy.... we hold that the city is properly the subject of a 1983 suit by Williams for his demo-

tion." 689 F.2d at 969.

> "... But, the power to establish policy is no more the exclusive province of the legislature at the local level than at the state or national level. *Monell's* language makes clear that *it expressly envisioned other officials' whose acts or edicts may fairly be said to represent official policy,...*" (emphasis added). *Pembaur*, 106 S.Ct. at 1298;

Thus, the City Council's approval is not essential to formulating City policy. For liability to attach a decision maker "must possess *final authority* to establish municipal policy with respect to that action ordered." *Id.*, at 1299. Fasi, as the decision maker in removing Sussel, made the policy to substitute Kekuna and had the final authority to remove under 6-104.

CONCLUSION

The Court should grant Certiorari and the summary judgment below should be reversed on Petitioner's First Amendment, Fourteenth Amendment, and 42 U.S.C. 1983 claims.

Respondents failed to show any legitimate reason for Sussel's January 2, 1985 demotion, especially where Fasi's new Civil Service Director stated that the demotion was for *non-disciplinary* reasons and his performance evaluation on November 30, 1984 was excellent. Construing the facts in the light most favorable to Sussel, he was demoted because he had not supported Fasi and he was in the way of Fasi's acknowledged *commitment* to his Republican supporter Kekuna who was rewarded with Sussel's job. The applicable causation test in *Rutan*-type cases should be settled. Applying the *Mt. Healthy* test shows that the political affiliation and support of Sussel's replacement and Sussel's non-affiliation were the substantial factors in Sussel's demotion in this First Amendment political discrimination case. Summary Judgment should be reversed (1) on Petitioner's First Amendment (and related 42 U.S.C. Section 1983) claims where genuine fact issues show his demotion was based on political affiliation and support reasons to make room for a Republican political patronage appointee who had supported Republican Fasi, and (2) on his Due Process claims where an impartial tribunal was denied him.

DATED: Honolulu, Hawaii; June 5, 1991.

Dennis W. King

DENNIS W. KING
WILLIAM J. DEELEY
810 Richards Street, Suite 810
Honolulu, Hawaii 96813
(808)533-1751
Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER

December 6, 1990

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

No. 89-15777
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15778
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15779
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

No. 89-15780
D.C. No. 86-1136-DAE

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

vs.

CITY AND COUNTY OF HONOLULU, et. at.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The memorandum disposition filed August 7, 1990, is withdrawn. The attached disposition is filed in its stead.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

MEMORANDUM[1]

December 6, 1990

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y'; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

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1 This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15780
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
David A. Ezra, District Judge, Presiding

Argued and Submitted April 9, 1990 Honolulu, Hawaii

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

Our independent review of the record supports the district court's conclusion that Sussel was in a civil service position. The state court decision resolves this issue. The central issue is therefore whether Sussel has alleged sufficient facts to support a claim for violation of due process: "It is not every erroneous administration of state law that results in a denial of due process." *Haygood v. Younger*, 769 F.2d 1350, 1357 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986). To determine whether a genuine issue of fact is presented on the question of due process we first determine if there was a property interest and if so, what process was due before the government could deprive Sussel of that property interest. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982).

As a civil servant, Sussel has a property interest in his job that is protectable and subject to due process. *See Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). The City civil service rules provide that when a covered employee is dismissed or demoted, there shall be written notice to the employee at least ten days prior to the effective date of the action, setting forth the reasons for the action taken. Revised Rules of the Civil Service Commission 1.1-D (Rule 10.2.c).

Sussel, however, was not terminated. He continues employment with the city and collects the same salary as he did before the acts complained of. The dispute is not whether demotion is an interest protected by the due process clause but whether Sussel was demoted or merely downwardly reallocated. The latter process is not protected by due process. State law determines the property interest in question but federal law determines whether or not the taking of such interest is a violation of due process. See Logan, 455 U.S. at 432.

Sussel has failed to establish a genuine issue of material fact as to whether he was denied property without due process. The "root requirement" of due process is "that an individual be given an opportunity for a hearing before he is deprived of any significant

property interest." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971) (first emphasis added, second emphasis in original), *quoted in, Loudermill*, 470 U.S. at 542. The hearing need not be a formal one. *See Loudermill*, 470 U.S. at 543 n.8. When Sussel's responsibilities were decreased, he had notice and a "hearing" before the Mayor, the person making the decision. He received notice and an opportunity for hearing before any change in pay occurred. Sussel also has an established post-deprivation procedure, with which he is familiar; that Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process. *Cf. Loudermill*, 470 U.S. at 547. The delay in this case is the result of legitimate appeals by the parties.

Whether Sussel was victim of poor treatment is not the question. He was not terminated and he retains his salary. *Cf. Loudermill*, 470 U.S. at 544-45.

Sussel also fails to establish a genuine issue of material fact on the first amendment claim. He has not alleged facts that support a claim that the exercise of his first amendment rights was a substantial or motivating factor for the actions taken towards him. *See Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 287 (1977). Sussel relies upon his letter to Fasi describing the problems present between the state and the city civil service defense organizations to support his argument. This letter was written several weeks after Fasi announced his intention to place Kekuna in a management position at the Oahu Civil Defense Agency. Further, Sussel has failed to present sufficient probative evidence that he was demoted solely on the basis of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990).

Sussel fails to raise a genuine issue of material fact on his equal protection claim. He alleges no facts to demonstrate that he was part of a group that is treated unequally. He complains of treatment to him as an individual. *See generally Plyer v. Doe*, 457 U.S. 202, 217 n.14 (1982) (fourteenth amendment designed to abolish "class or caste" treatment). He also fails to allege sufficiently egregious treatment to reach the level of a substantive due process violation. *See e.g., United States v. Salerno*, 481 U.S. 739, 746 (1987) (substantive due process prohibits conduct that shocks the conscience or interferes with rights implicit in the concept of ordered liberty).

Summary judgment was appropriate on all of Sussel's federal claims. It was therefore within the district court's discretion to

remand all state issues. *See* 28 U.S.C. § 1441(c); *Carnegie- Mellon University v. Cohill*, 484 U.S. 343 (1988). Because these claims could have been pled in the alternative, *see* Fed. R. Civ. P. 8(e)(2), we vacate the summary judgment as to them and remand so that the district court may have an opportunity to consider whether the state contract claims should be dismissed without prejudice to Sussel's pursuing them in a state forum.

AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

NOT FOR PUBLICATION

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,
No. 89-15652

D.C. No. 86-1136-DAE
Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER

February 7, 1991

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y' ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,

Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The memorandum disposition filed December 6, 1990, is amended as follows. At page 5, delete the last two sentences of the second full paragraph and insert,

Further, Sussel has failed to present sufficient probative evidence that he was demoted because of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S. Ct. 2729, 2735 (1990).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL,

CIVIL NOS. 86-1136
88-00375

Plaintiff,
vs.
CITY AND COUNTY OF HONOLULU,et al.

Defendants.
March 3, 1989

DECISION ON PLAINTIFF'S AND DEFENDANTS' VARIOUS MOTIONS FOR SUMMARY JUDGMENT, TO DISMISS, TO STAY PROCEEDINGS, AND FOR OTHER RELIEF

BACKGROUND [1]

Malcolm A. Sussel ("plaintiff") brings these cases alleging various violations of the United States and State of Hawaii Constitutions and Hawaii State Statutes and further asserts certain common law claims for his alleged demotion from his position with the City & County of Honolulu as Administrator of the Oahu Civil Defense Agency ("OCDA"). Named as defendants are the City & County of Honolulu ("City"), Mayor Frank Fasi ("Fasi"), former Managing Director D.G. "Andy" Anderson ("Anderson"), Administrative Assistant to the Managing Director George Kekuna ("Kekuna"), Director of the Department of Civil Service Loretta Fukuda ("Fukuda"), and The Civil Service Commission and its individual members in their official capacities ("Commission"). Fasi, Anderson, Kekuna

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1 Although the factual background of these cases are, for the most part, undisputed, it will be noted where the parties' versions differ in some relevant aspects. However, for the purposes of each motion, this court must construe the facts in the light most favorable to the non-moving party on that motion. T.W. Electrical Services, Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987).

and Fukuda are named in both individual and official capacities. Defendant Jeremy Harris ("Harris") is also named in his official capacity as the current Managing Director of the City & County of Honolulu.

Plaintiff was appointed to the position of Administrator of OCDA[2] on June 2, 1982 by Eileen Anderson, who had defeated the incumbent, defendant Fasi, for re-election as Mayor of the City & County of Honolulu. Plaintiff was selected after making application and being reviewed pursuant to the relevant civil service procedures in place at that time. At the time of his application, he was serving as assistant Administrator of OCDA, a position which all parties to these cases agree is a civil service position.

Among other things, plaintiff alleges he relied on past policies and upon the representations of the Eileen Anderson administration in forming the belief that his position as OCDA Administrator was "permanent" unless good cause was shown for his removal: i.e., that the position was subject to civil service status and protection. In addition, in December 1984, the Corporation Counsel, legal advisor to the City, restated an earlier opinion that the Administrator's position was in fact subject to civil service commission rules.

In the ensuing mayoral election, Fasi changed political parties (from Democrat to Republican) and defeated Mayor Anderson, assuming office January 2, 1985. In December 1984, before taking office, Fasi determined to hire a replacement for plaintiff to run OCDA. Plaintiff claims Fasi specifically decided to hire Kekuna for this role in the new administration. Fasi submits Kekuna's name was supplied by a committee set up for that purpose.

Kekuna's title would become "Deputy Director Designate"[3]

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2 The City contends that plaintiff is not the "Administrator" of OCDA because, officially, there exists no such position. This court finds, contrary to defendant's argument, that plaintiff was "Administrator" of OCDA in reality if not in title. Although plaintiff was classified "Executive Assistant I" and not "Administrator", the position he held was initially advertised as "Administrator" and has been so known all along. This distinction, however, is one without a difference. Neither plaintiff's rights nor the defendants' responsibilities depend upon the "title" plaintiff held but rather, they depend upon the position he occupied.

3 Under the applicable statutes and rules, the state appoints a Director of the Civil Defense agency for the entire State of Hawaii. Upon the recommendation of that state director, each county then appoints a Deputy Director for that county. Traditionally, the Deputy Director for the Island of Oahu is the Mayor of the City & County of Honolulu.

and that position would officially be a part of the City's Managing Director's office. According to plaintiff, on December 15, 1984, Fasi told plaintiff that plaintiff's position was not subject to civil service commission rules and that Kekuna would be assuming plaintiff's duties at OCDA.

On January 2, 1985, plaintiff also alleges defendant Anderson admitted that the OCDA position was subject to civil service commission rules but that defendant Fasi was going to allow Kekuna to run OCDA to fulfill a political promise. (Plaintiff claims Kekuna assisted Fasi in Fasi's campaign.) On this same date, Fasi, Anderson, Kekuna and defendant Fukuda were sworn into office.

On January 7, 1985, Fasi, through Anderson, named Kekuna to assist in the management of OCDA. Anderson circulated a memo among the employees of the OCDA instructing them to look to Kekuna "for direction and guidance." Kekuna told plaintiff that he, Kekuna, would be in authority at OCDA and required plaintiff to remove his personal belongings from the office plaintiff had up to then occupied. On January 11, 1985, Anderson appointed an assistant for Kekuna and, by letter, told plaintiff to work only regular hours, not to respond to emergencies, and to turn in his pager and his keys "to the executive toilet". Plaintiff was again required to change offices.

On January 9, 1985, according to plaintiff, Fukuda (appointed Director of Department of Civil Service) told plaintiff that because plaintiff's position was not civil service, Fasi and Anderson could do anything they wanted to do with regard to plaintiff's position.

Plaintiff was "demoted"[4] from Executive Assistant I to Administrative Assistant II on January 11, 1985. During this time, plaintiff was stripped of all authority and responsibility although his base salary was protected. Plaintiff contends, however, that he has not received approximately $17,000 in pay increases which he would have otherwise received due to the change in his salary classification.

On January 25, 1985, plaintiff filed a timely appeal of this action to the Civil Service Commission asserting that he was a civil service employee filling a civil service position. Therefore, he contended he was entitled to written notice prior to his demotion and a showing of

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4 The City contends that plaintiff was not "demoted". He was "reclassified" from Executive Assistant I to Administrative Assistant II, retaining the same salary level and remaining in the same department: OCDA. Therefore, it reasons, it was a "downward reallocation", not a demotion. That being the case, under this reasoning, plaintiff was entitled to no notice or hearing under the civil service rules.

"cause" for that demotion. On January 7, 1986, a decision of the Commission was rendered that the position of Administrator of OCDA was not subject to civil service requirements. Plaintiff appealed that decision to the First Circuit Court of the State of Hawaii.[5] On May 22, 1987, the Honorable Edwin H. Honda, Circuit Court Judge of the First Circuit, reversed the Commission and ruled the plaintiff's position was in fact a civil service position and remanded the matter to the Commission for proceedings in accordance with the court's ruling.

After plaintiff's appeal of the commission's decision but before the state court's ruling was received, plaintiff filed suit in this court (Civil No. 86-1136) seeking damages under 42 U.S.C. § 1983 and pendent state claims for defendants' alleged deprivations of plaintiff's due process rights.

After the matter was remanded to the Commission, plaintiff petitioned several of the commission members to disqualify themselves from further involvement in plaintiff's case. Upon their refusal to do so, plaintiff petitioned the state circuit court for their removal. The court (Honorable Marie N. Milks presiding) found only one member of the Commission biased. Plaintiff appealed the circuit court's failure to remove one other member of the Commission to the Hawaii State Supreme Court. On plaintiff's motion, the State Supreme Court has stayed further commission action pending its resolution of that appeal.

On December 16, 1987, after the remand to the Commission but before plaintiff's challenge to the commission members' qualifications, the Honorable James Ideman, Visiting United State District Court Judge, entered an order staying this action pending the final resolution of the commission proceedings and resultant state court review.

It is not disputed that plaintiff was stripped of his duties and benefits as Administrator of OCDA and re-classified to a salary position which deleted some of the salary increases to which he would otherwise have been entitled. This was accomplished by "red-circling" his salary: i.e., leaving plaintiff at a salary level higher than that usually accorded an Administrative Assistant II. Plaintiff lost his title, his authority and his office. On these undisputed facts, this court finds that plaintiff was in fact "demoted".

5 *Malcolm A. Sussel v. Civil Service Commission of the City and County of Honolulu, et al.*, Civil No. 86-0328 (1986).

On April 29, 1988, plaintiff filed a second complaint in state circuit court which is virtually identical to the complaint originally filed here (Civil No. 86-1136): the only difference being the addition of two claims. That state case (now Civil No. 88-00375) was removed to this court by defendants. After plaintiff's challenge of the Commission for bias but prior to the removal of the state case, Judge Ideman vacated his stay in Civil No. 86-1136.

On December 22, 1988, a claim was filed by the City as plaintiff's employer with the state Workers Compensation Department for damages resulting from "administrative actions which allegedly occurred at his place of employment."

PLAINTIFF'S CLAIMS FOR RELIEF

Based on the above facts, plaintiff's consolidated complaints allege the following causes of action against all defendants:

(1) violation of the Revised Charter of the City & County of Honolulu, Section 6-104, Hawaii Rev. Stat. §§ 128-13(1) and 128-13(d), Article XVI, Section I and Article I, Section 5 of the Hawaii State Constitution and the due process and equal protection rights guaranteed by the fourteenth amendment to the Untied States Constitution;

(2) 42 U.S.C. § 1983;

(3) pendent state claims (those listed in Claim 1) to § 1983;

(4) conspiracy to violate civil rights;

(5) negligent and/or intentional infliction of serious mental and emotional distress;

(6) breach of contract;

(7) tortious breach of covenant of good faith and fair dealing;

(8) political discrimination in violation of Section 6-312 of the Revised Charter of the City & County of Honolulu;

(9) intentional and/or negligent misrepresentation;

(10) equitable estoppel, implied contract, unjust, abusive and wrongful dismissal or removal;

(11) intentional interference with contract relations;

(12) defamation;

(13) conspiracy to commit torts, wrongful conduct, and breach of contract;

(14) negligence;

(15) punitive damages;

(16) disqualification of biased commission; and

(17) violation of Section 6-104 of the Revised Charter of the City and County of Honolulu.[6]

Plaintiff asserts jurisdiction in this court based upon 28 U.S.C. §§ 1343, 2201, 2202, and 1331.

Defendants filed answers to plaintiff's complaints denying the allegations therein. Defendants Fasi, Anderson, Kekuna and Fukuda have also filed cross-claims against the City for contribution and indemnity. However, those cross-claims are not the subject of any of the instant motions.

PENDING MOTIONS

On February 15, 1989, the following motions filed by the various parties came on for hearing before this court:[7]

(1) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claims 1, 2 and 3;

(2) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claim 3;

(3) Defendant City's Motion for Partial Summary Judgment filed August 16, 1988 as to Claims 1, 2, 3, 4, 6, 7, 10, 11, 12, and 15 (filed on behalf of all defendants in all capacities);

(4) Plaintiff's Motion for Partial Summary Judgment filed January 4, 1989 as to Claims 1, 2, 3 and 14;

(5) Defendant Anderson's Motion t Stay Proceedings or To Dismiss filed January 6, 1989;

(6) Defendant City's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to all claims;

(7) Defendant Anderson's Motion for Summary Judgment in his individual capacity filed January 17, 1989 as to all claims;

(8) Defendant Anderson's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to Claim 12;

(9) Defendant Fasi's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to Claim 12;

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6 Although some of the claims in Civil No. 88-00375 are numbered differently from those in Civil No. 86-1136, for ease of understanding, plaintiff's claims will be referred to as numbered in this order. The two additional claims added by Civil No. 88 00375 are numbered 16 and 17 herein.

7 Also heard at this hearing was an appeal of a Magistrate's Order On Several Motions Regarding Representation By Counsel filed February 2, 1989. This court's decision on that appeal is set forth in a separate order dated February 21, 1989.

(10) Defendant Fasi's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims;

(11) Defendant Fukuda's Motion for Summary Judgment or to Dismiss filed January 17, 1989 as to all claims ;

(12) Defendant Fukuda's Motion for Rule 11 sanctions filed January 17, 1989;

(13) Defendant City's Motion to Dismiss Civil Service Commission and all individuals in *official* capacities filed January 25, 1989; and,

(14) Defendant Fukuda's Cross-Motion for Summary Judgment filed January 27, 1989 as to all Claims except Claim 12.

All parties were represented by counsel at the hearing and given the opportunity to argue all motions. All defendants have either authored or joined in all motions on behalf of all other defendants.

LEGAL STANDARD

All motions, except the Motion to Reinstate the Stay and the Motion for Rule 11 Sanctions, are for summary judgment, partial summary judgment or to dismiss part or all of plaintiff's complaints. Because matters outside the pleadings have been considered by the written and oral submissions of counsel, all motions (except those two specifically mentioned above) will be treated as Rule 56 motions for summary judgment or partial summary judgment. Fed. R. Civ. P. 12(c); *Rosales v. United States*, 824 F.2d 799, 802 (9th Cir. 1987).

Fed. R. Civ. P. 56(c) provides for summary judgment when:

> . . . the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Electrical Services, Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (*citing Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2553 (1986).

If the moving party meets this burden, then the opposing party may not defeat a motion for summary judgment absent any significant

probative evidence tending to support his claim. *Commodity Futures Trading Comm'n v. Savage*, 611 F. 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the moving party's evidence at trial. *See T.W. Elec., supra.*

When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts must be drawn in the light most favorable to the opposing party and may be drawn both from underlying facts that are not in dispute as well as from disputed facts. T.W. Elec., 809 F.2d at 631.

As stated in *California Arch. Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987), cert. denied, 108 S.Ct. 698 & 699 (1988):

> In three recent cases, the Supreme, Court, by clarifying what the non-moving party must do to withstand a motion for summary judgment, has increased the utility of summary judgment. First the Court has made clear that if the non-moving party will bear the burden of proof at trial ass to an element essential to its case, and the party fails to make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element, then summary judgment is appropriate. *See Celotex v. Catrett*, U.S., 106 S.Ct. 2548, 2552 53, 91 L.Ed. 2d 265 (1986). Second, to withstand a motion for summary judgment, the non-moving party must show that there are "genuine factual issues that properly can be resolved only by a finder of fact *because they may reasonably be resolved in favor of either party.*" *Anderson v. Liberty Lobby, Inc.*, U.S. , 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (emphasis added). Finally, if the factual context makes that non-moving party's claims implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show there is a genuine issue for trial. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986).

DISCUSSION

I. CIVIL SERVICE STATUS

Initially, this court must address the seminal issue in this case: Was the position of Administrator of the Oahu Civil Defense Agency a civil service position at the time plaintiff was selected for and occupied that position?

This court's function in determining an issue of state law is to make a reasonable effort to determine how the state courts would rule on that issue.[8]

In 1969, Fasi replaced the then Administrator of the OCDA, Ralph Neal, without notice or "cause". In *Neal v. Fasi*, Civil No. 27338, First Circuit Court, the court held the position of Administrator of OCDA was covered by civil service rules. Neal, however, resigned the position almost immediately after the court's decision and that decision was never appealed. Anderson claims this decision has no force here because: a) it was never appealed; b) Neal resigned immediately after the court decision rendering its conclusion moot; and c) the law changed after 1969.

On October 22, 1981, the Corporation Counsel for the City issued an opinion that the Administrator of the OCDA was subject to civil service commission rules as set forth in *Neal v. Fasi*. As previously indicated, in 1984, the Corporation Counsel again reaffirmed its opinion.

It is uncontroverted that the position for which plaintiff applied was advertised by the City as a civil service position. Plaintiff applied for, was selected and, once selected, was reviewed under civil service guidelines (6 month probationary review before permanent status given and annual reviews).

In viewing this issue, one item of documentary evidence gives additional support to the proposition that the OCDA position was always intended by the City to be a civil service position. Bill No. 171 (1986), Draft 3 was submitted to the City Council of the City & County of Honolulu and entitled: A BILL FOR AN ORDINANCE TO AMEND CHAPTER 2, REVISED ORDINANCES OF HONOLULU 1978, AS AMENDED, TO ADD A NEW ARTICLE RELATING TO THE OAHU CIVIL DEFENSE AGENCY. The effect of that

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8 The court notes that there is no disagreement that plaintiff himself is protected by civil service. In fact, the City concedes this issue. The question relates to the position which plaintiff held.

bill was to specifically include the civil defense Administrator's position within civil service. That bill was approved by the City Council over the mayor's veto on January 14, 1987.

Fasi concedes that this bill would assist plaintiff but only if it had been in existence before he was removed from his position. Therefore, by implication he argues that no inference should be drawn from the bill's passage. (A copy of the bill and a copy of the council's action approving it were attached as exhibits to Fasi's January 17, 1989 Motion To Dismiss or For Partial Summary Judgment.)

However, even a cursory reading of the bill indicates that it is much more than a statement by the City Council that it wanted at the time of the bill's passage to make this position one of civil service. As stated in the bill: "It is the intent of the Council in enacting this ordinance to clarify the meaning of the term 'employee' in Section 6-303(b) RCH, to include the Civil Defense Administrator." (Emphasis added). As will be pointed out below, this was a statement of the Council's intent to indicate that it was always the City's intention that the position be considered civil service.

Until Bill No. 171 was passed, Section 6-303 provided for the exemption of certain executive branch *positions* from the city civil service laws and included:

> (b) Positions in the office of the mayor, but such positions shall be included in the position classification plan. Employees of the office of information and complaint, municipal reference and records center and Royal Hawaiian Band, other than the heads of such agencies, and *employees of the civil defense agency shall not be exempted from civil service.* (Emphasis added).

This section was effective throughout the years plaintiff served OCDA.

Defendants argue that the term "employee" did not include the head of the civil defense agency. However, the language of the bill makes it clear that it was the original purpose of the council to include the Administrator of OCDA as an "employee" as defined by this subsection. As the drafters of the bill declared:

This view is supported by the language of

> Section 6-303(b) itself which includes the heads of the Office of Information and Complaint, the Municipal Reference and Records Center, and the Royal Hawaiian Band in the term "employee" as it refers to those agencies. This view is further supported by the records of the Charter Commission that drafted this provision, indicating that the Commission had knowledge that the Circuit Court of the First Circuit, State of Hawaii, had determined the City's Civil Defense Administrator to be a civil service *position* and indicating its desire to maintain the civil service status of *positions* that had theretofore been civil service *positions*. (Emphasis added).[9]

This bill clearly deals with the position of Administrator and not its occupant. Further, it does not represent a change of attitude by the City Council. Rather, it is a statement of the council's intent from the outset: i.e., the position of Administrator of OCDA is one of civil service. This bill was approved over the veto of the mayor while this case was pending.[10] It is a statement of intent by the City and is therefore admissible in this court as a statement against interest.[11] It

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9 This statement is taken from the comments of the drafters of Bill No. 171 which are included as part of that document.

10 This court notes that the language of the bill as passed recognized the existence of plaintiff's appeal to the civil service commission and this court action. Section 3 of the enacted ordinance states:

> Nothing in this ordinance shall prejudice the rights of any person finally adjudicated by a court of competent jurisdiction to be subject to the civil service laws and to be the civil defense Administrator of the City and County of Honolulu to continue in that office subject to this ordinance.

11 Fed. R. Evid. 804(b)(3) defines this exception to the hearsay rule as:

> A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability, or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true. . . .

The council's action clearly falls within this exception.

also constitutes a restatement of the Final Report of the Charter Commission of the City and County, 1971 1972. In part, that document reads:

> It is intended that the employees of the agency within the office of the Mayor . . . or agencies attached to the managing director's office for administrative purposes (. . . civil defense agency . . .) be civil service employees, but the heads of these agencies, *excepting the head of the civil defense agency*, are exempt from civil service and the position classification plan. (Emphasis added.)

As noted above, State Circuit Judge Honda found plaintiff's position to be civil service. Although that decision is not final for purposes of appeal and not binding here, it gives this court further affirmative guidance on the likely resolution of this issue in state court. It is noted that Judge Honda's opinion is well reasoned and reaches a conclusion with which this court agrees.

Accordingly, it is clear, and the court so finds, that the position of Administrator of OCDA was a civil service position at all times relevant to the subject matter of this case. Therefore, plaintiff was entitled to a 10-day written notice of his demotion (Revised Rules of the Civil Service Commission, Rule 10.3.c[12]) and an opportunity to challenge the demotion decision (Rule 10.5). Further, he was entitled to be demoted only for cause (Rule 10.3-a). Defendants claim that because plaintiff was: (a) informed of Fasi's decision in December 1984; and (b) was allowed to meet informally with Fasi to discuss the matter, he was given all the due process to which he was entitled. A determination of this issue will not be made by this court for reasons set forth below.

Therefore, plaintiff's Motion for partial Summary Judgment on the issue of his civil service status filed August 15, 1988 is granted.

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12 These rules are part of the Revised Rules of the Civil Service Commission effective as of January 2, 1985.

II. CLAIMS BASED IN CONTRACT

The majority of plaintiff's breach of contract claims are, by his won admission, couched in the alternative: i.e., plaintiff claims he was entitled to retain his position based on either its civil service status or he claims entitlement to the same result based on an implied contract of employment. If such an implied contract did exist, plaintiff argues that its terms would be the same as the terms of his employment as a civil service employee.

Since this court has found that the position of Administrator of OCDA was a civil service position, there can have been no implied contract. That being the case, plaintiff's claims based in contract and those arising because a contract is alleged to have existed must be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). They are:

Claim 6 - Breach of Contract

Claim 7[13] - Implied Covenant of Good Faith and Fair Dealing

Claim 9 - Negligent Misrepresentation

Claim 10 - Equitable Estoppel, Implied Contract, unjust Dismissal or Removal

Claim 11 - Intentional Interference with Contractual Relations

Claim 13 - That portion relating to Breach of Contract.

Defendants' motions for summary judgment on these claims are therefore granted.

III. § 1983 - OFFICIAL POLICY

To establish a claim against the City under 42 U.S.C. §1983, plaintiff must show that a policy or custom of the City, "whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy", was the "moving force" which caused his injuries. *Monell v. Dept. of Soc. Serv. of City of N.Y.*, 436 U.S. 658, 694 (1978). *See* also *Wood v. Sunn*, 852 F.2d 1205, 1212 (9th Cir. 1988); *Meehan v. County of Los Angeles*, 856 F.2d 102, 106-07 (9th

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13 Plaintiff contends this cause of action would still exist even if the duty to deal fairly was *expressed* as it is in the civil service regulations. This court rejects this theory as illogical. Further, this cause of action has been specifically rejected in Hawaii. *Parnar v. Americana Hotels, Inc.*, 65 Hawaii 370 (1982); *Kinoshita v. Canadian Pacific Airlines, Ltd.*, 68 Hawaii , 724 P.2d 110, 115 (1986).

Cir. 1988). As noted above, plaintiff has charged that his injuries were the result of acts *contrary* to the United States Constitution, the Hawaii State Constitution, Hawaii State Law and the revised Charter of the City. Plaintiff has not, by these claims, alleged an affirmative policy or custom of the City.

Plaintiff submits, however, that this "policy" requirement can be met even if specific acts complained of are not formally approved through official decision-making channels if they are acquiesced in or adopted by the relevant decision making authorities. This is a correct statement. However, for those acts and practices to suffice and become, as a matter of law, the "policy" of the City, they must "be so permanent and well settled as to constitute a 'custom or usage' with the force of law." *Monell*, 436 U.S. at 691 (footnote omitted).

Construing the facts before this court in the light most favorable to the plaintiff, he has failed to carry his burden regarding this element of his case. Plaintiff claims defendant Fasi's attempt to replace Mr. neal in 1969 coupled with his own demotion in 1985 constitute the custom and usage required by *Monell*. The facts do not support this contention in light of relevant City documents referred to elsewhere in this order. No credible evidence has been submitted plaintiff to this court to suggest that the City, through its City Council or otherwise, has either adopted or tacitly approved the acts of its officers which may have contravened City rules, or state and federal law.

Further, conduct which may reflect the *personal policy* of an agent of the City does not automatically translate into official policy of the City itself. The City cannot be held liable under § 1983 merely for employing an alleged tortfeasor. *Monell, supra; Wood, supra; Meehan, supra.*

Therefore, the § 1983 claim (Claim 2) against the City must be dismissed. Fed. R. Civ. P. 12(h)(3).[14] Also dismissed is the related allegation of conspiracy by the City to violate §1983 (Claim 4).

The City has also requested this court extend the reasoning of *Kentucky v. Graham*, 473 U.S. 159 (1985) and dismiss all claims including the 42 U.S.C. § 1983 claim filed against the individual defendants in their official capacities as well as all claims against the Commission and its members.

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14 Fed. R. Civ. P. 12(h)(3) states: "Whenever it appear by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

In *Kentucky v. Graham*, supra, suit was filed against the Commonwealth of Kentucky and several of its agents. The Commonwealth of Kentucky was dismissed as a defendant due to eleventh amendment immunity. The Supreme Court correctly noted that the inclusion of the entity itself as a named party was unnecessary because the liability of an agent in his official capacity is, in reality, liability of the governmental employer. The City reasons that if the action is maintained against the City, the inclusion of the City's agents in their *official* capacities is unnecessary. This court agrees.

Whether the City is named in this suit or not, liability for the acts of its agents and employees performed in their official capacities will be imposed upon the City. That is the clear teaching of Kentucky v. Graham, supra. This court finds that the reverse in also true: i.e., that such liability is imposed when the City is a named defendant whether or not the agents or employees (in their *official* capacities) are named.

Therefore, based upon the reasoning of *Kentucky v. Graham, supra*, this court finds no legal basis for the individual defendants in their *official* capacities or the Commission and its members to remain as parties in this suit.

Accordingly, the City's motion to dismiss all claims against the Commission and its members and all claims against the individually-named defendants in their *official* capacity is granted.

This court however does find that plaintiff has asserted facts sufficient to maintain his 42 U.S.C. § 1983 claim against those defendants sued in their *individual* capacities. Therefore, defendants' motion for summary judgment on this issue is denied as to those defendants.

IV. QUALIFIED IMMUNITY

Defendants seek a ruling that their actions were objectively reasonable as a matter of law and, therefore, that they are absolutely shielded from any liability through the doctrine of qualified immunity.[15] Plaintiff, however, has raised sufficient questions of material fact on this issue to defeat summary judgment. He has alleged that defendants intentionally violated city charter provisions and state

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15 "[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). See also: *Mitchell v. Forsyth*, 472 U.S. 511, 517 (1985).

law. The issue of the "reasonableness" of the various defendants' conduct is vigorously disputed as are several critical underlying facts giving rise to plaintiff's reassignment.

These disputed factual issues cannot be resolved absent a testing by the trier of fact of the weight and credibility of the evidence. Given the state of the record, this court cannot find that defendants' conduct was objectively reasonable as a matter of law. *Harlow, supra.*

Therefore, defendants' motion for summary judgment on the issue of qualified immunity is denied.

V. SUBSTANTIVE DUE PROCESS AND EQUAL PROTECTION

Plaintiff contends that his *substantive* due process rights under the fourteenth amendment were violated when he was demoted. However, it is well established that the right to employment is an "entitlement" which is a *property* interest is opposed to a liberty interest. *Punton v. City of Seattle*, 805 F.2d 1378 (9th Cir. 1986), *cert. denied*, 481 U.S. 1029 (1987). The deprivation of a property interest is a violation of *procedural*, not substantive, due process. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Arnett v. Kennedy*, 416 U.S. 134 (1976); *Bishop v. Wood*, 426 U.S. 341 (1976).

Plaintiff cites *Loudermill, supra*, for his assertion that a denial of a pre-termination hearing is a per se denial of substantive due process. Plaintiff's reliance, however, is misplaced. The reasoning and holding of that case are based on facts critically different from the facts present here. The Court in *Loudermill* required a pre-termination hearing where the means of a worker's livelihood are *terminated*. The *Loudermill* Court balanced the private interests in "retaining employment" on the one hand and the "governmental interest in the expeditious *removal* of employees and avoidance of administrative burdens, and the risk of erroneous termination" on the other. *Id.* at 542-43 (emphasis added). The key phrase in the balancing test for the *Loudermill* Court was "retaining employment". This is made clear in Justice Marshall's concurring opinion when he agreed that a pre-termination hearing was required *"before the decision is made to terminate an employee's wages." Id.* at 548 (emphasis in original concurring opinion).

As noted previously, neither plaintiff's employment nor his

wages were terminated. He was allegedly not given the procedural protections which the city charter ensured him. This is clearly an allegation of a *procedural* violation.

Plaintiff has also claimed that his right to equal protection of the laws has been violated. It is well established that the equal protection clause of the United States Constitution[16] requires similar treatment for all persons similarly situated. *Hoffmann v. United States*, 767 F.2d 1431 (1985). Plaintiff claims that he was not given certain benefits which were due him. He is not alleging that he was placed in an inappropriate class of city agency heads nor that he was singled out from others in his class. Plaintiff's claims are thus for denial of due process. There is simply no equal protection claim stated here. *See*, e.g., *Constitutional Law*, Second Edition (1984) by John E. Nowak, Ronald D. Rotunda and J. Nelson Young, Chapter 16.

Therefore, the defendants' motion for summary judgement as to the plaintiff's allegations of violations of substantive due process and equal protection of the law found in Claim 1 is granted.

VI. MOTION TO DETERMINE STATUS OF KEKUNA

Plaintiff moves for summary judgment to determine as a matter of law that Kekuna was never lawfully appointed to the position of Deputy Director-Designate.

Under Hawaii Rev. Stat. § 128-3(d), the State Civil Defense Director shall, "with the approval of the county council," appoint a deputy director to head the county civil defense agency. Those deputy directors are subject to Chapter 76 of Hawaii Revised Statutes (Civil Service Laws).[17] An appointment of an assistant to the deputy director

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16 U.S. Const. amend. XIV, § 1: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

17 §128-3(d) provides in relevant part:

> The director shall, with the approval of the county council, appoint for each political subdivision a deputy director who may be removed by the director. . . . Chapter 76 shall apply to full-time deputy directors.

may be made if "approved by the director of civil defense." That assistant is also subject to Chapter 76.[18]

Plaintiff contends that the City violated Hawaii Rev. Stat. §§ 128-3(d) and 128-13(1) because neither the mayor (as Deputy Director) nor Kekuna (as Deputy Director-Designate) were approved by the city council or the state director as required nor were they selected pursuant to the civil service process set out in Chapter 76. Further, plaintiff claims Fasi violated Hawaii Rev. Stat. § 128-12 when he "designated" his duties as deputy director to Kekuna because, he argues, *only* the mayor can perform those duties.[19]

The City argues that the mayor has powers granted by the City Charter to manage City agencies (i.e., assign and reassign duties) as he sees fit in order to efficiently carry out the responsibilities of his office. It was under this authority the City claims that Kekuna was appointed, not under the authority of state statute.

Defendants have directed this court to material issues of fact which require this court to deny plaintiff's motion. The issues include: Was Kekuna appointed under state statute or the mayor's general powers of administration as granted by the city charter? This question can only be answered after additional facts surrounding that appointment are deduced at trial.

Therefore, plaintiff's motion is denied.

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18 Hawaii Rev. Sta. § 128-13(1) states, in part:

> Each political subdivision shall have the power and authority: (1) Deputy director's staff. To provide, for the deputy director of such political subdivision, an assistant or assistants whose appointments shall be approved by the director of civil defense .... Chapter 76 shall apply to the full-time deputy director or the deputy director's first assistant.

19 Hawaii Rev. Stat. § 128-12 provides, in part:

> The *deputy director* for each political subdivision shall have direct responsibility for the organization, administration, and operation of the local organizations for civil defense, subject to the direction and control of the governor and director of civil defense, and subject to the assumption of direct operational control of the governor and director as provided in this chapter. (Emphasis added.)

VII. MOTION TO DISMISS PUNITIVE DAMAGES

Plaintiff is entitled to recover punitive damages only upon a showing that the conduct of the defendants was reckless or they acted with callous disregard for the rights of others, *Smith v. Wade*, 461 U.S. 30, 51 (1983), or for conduct which shows gross negligence, actual malice or criminal indifference, *Protectors Alpha Nav. v. N. Pacific Grain Growers*, 767 F.2d 1379 (9th Cir. 1985).

Plaintiff has alleged, through his affidavit and various written submissions, that the conduct of the defendants in demoting him without notice or cause evidenced such intent. However, defendants, by their own depositions, have denied those allegations.

For purposes of this motion, this court must accept the evidence submitted by plaintiff as true as well as any reasonable inferences drawn therefrom. *T.W. Elec.*, 809 F.2d at 631.

There are clearly issues of material fact raised here regarding the intent of the parties. There can be no ruling by this court as a matter of law that defendants did not act with the intent required for an award of punitive damages.

Therefore, this motion is denied.

VIII. DEFAMATION

On January 7, 1985 and October 11, 1985, Anderson issues memoranda regarding Kekuna's taking over at OCDA. On February 20, 1985, a confidential memorandum was released to the *Honolulu Star-Bulletin* by Fasi. In October 85, Fasi, on a KGU radio talk show, made remarks about plaintiff and attributed statements to plaintiff that plaintiff contends he did not make. This conduct forms the bases for the defamation allegations found in Claim 12 of both complaints.

Although plaintiff includes all defendants in his defamation claims, he only alleges that statements were made or published by Kekuna, Fasi and Anderson. Fukuda is only included in this claim because of her testimony before the Commission.

Federal law applies to this first amendment claim. *Leidholdt v. L.F.P. Inc.*, 860 F.2d 890 (1988). This circuit has often relied on the *Restatement (Second) of Torts* in this area. See e.g., *Lewis v. Time Inc.*, 710 F.2d 549 (1983); *Ault v. Hustler Magazine*, Inc., 860 F.2d 877 (1988). *The Restatement (Second) of Torts*, Section 559 defines a communication as defamatory when it tends to "harm the reputation of another as to lower him in the estimation of the community or deter third persons from associating or dealing with him."

The statement must be asserted as the truth and not merely opinion. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 40 (1974); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783-84 (9th Cir. 1980). If the statement made is one of opinion, the plaintiff's claim as to that statement must fail. *Leidholdt*, 860 F.2d at 893; Ault, 860 F.2d at 880-81.

Plaintiff argues that opinions, while not generally actionable, may still be actionable if those opinions imply facts which are unknown to the reader or listener. He cites the *Restatement (Second) Torts*, Section 566 which states:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed *defamatory facts* as the basis for the opinion. (Emphasis added.)

Plaintiff asserts that, since Fasi, Anderson and Kekuna were aware of facts to which the readers and listeners did not have access, their opinions expressed are actionable per se under the Restatement.

However, this is not what the cited rule states. The "undisclosed" facts implied must be *defamatory*. Plaintiff does not allege that any of the underlying undisclosed facts are defamatory; he simply states that they are undisclosed. Again, this does not satisfy plaintiff's duty under Rule 56. *Anderson, supra.*

Further, if plaintiff was a public figure at the time the alleged false statements were made, he must also show that those statements were made with "actual malice." *Leidholdt, supra*, at 893; *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 80 (1964). Plaintiff admits that he is a public figure. He was the head of a state agency and its media representative. As evidenced by the numerous news articles and other documents submitted by all parties, he placed himself and this issue before the public in an effort to assist his cause. He cannot, and does not, deny that he has "thrust [himself] to the forefront of [a] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345.

As noted above, because plaintiff was a public figure, he must show "actual malice" if he is to prevail and he must do so with "clear and convincing clarity." To prove actual malice, plaintiff must show that defendant made the defamatory statement, if any, "knowing that

it was false" or "with reckless disregard of whether it was false or not." *Fong v. Merena*, 66 Hawaii 72, 74 (1982); *Hoke v. Paul*, 65 Hawaii 478, 481 (1982); *Rodriguez v. Nishiki*, 65 Hawaii 430, 436 (1982); *Tagawa v. Maui Publishing Co.*, 50 Hawaii 648, 652 (1968), *cert. denied*, 396 U.S. 822 (1969). *See* also *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *New York Times v. Sullivan*, 376 U.S. 254 (1964); *Dworkin v. Hustler Magazine*, No. 87-6393, slip. op. filed January 26, 1989 (9th Cir.).

Therefore, for plaintiff's claims of defamation to withstand summary judgment, they must meet three requirements. They must: 1) be arguably defamatory; 2) be asserted as the truth; and 3) have been made with "actual malice." In construing suspect statements, the words and implications arising therefrom are to be "given their natural and obvious meaning." *Costello v. Capital Cities Communications*, 505 N.E.2d 701 (Ill. App. 5. 1987); *Ollman v. Evans*, 750 F.2d 970 (D.C.Cir. 1984).

A. STATEMENTS

1. Statements by Kekuna

On February 20, 1985, Fasi released to the *Honolulu Star-Bulletin* newspaper a confidential memorandum entitled "Organizational Analysis" prepared by Kekuna and addressed to Fasi which plaintiff says "represented that Plaintiff isolated himself from other staff members, failed to adequately upgrade emergency preparedness plans, failed to communicate with staff members on crucial matters, and gave preferential treatment to certain staff." (Complaint, p. 38.) the memorandum is dated January 31, 1985 and was prepared by Kekuna to offer his observations of the civil defense agency after heading OCDA for one month.

(a) The "Management" section of the memorandum began: "There is an obvious difference in management style between my predecessor and myself." He further suggested the actions taken by plaintiff in down-grading the Asst. Administrator's position "appear to have been taken with the intent of isolating the 'Administrator's' position [and the incumbent] into one of necessity to the agency. . . ."

There is simply nothing in the ordinary meaning and/or implications of these remarks that a jury could find to "lower [plaintiff] in the estimation of the community or deter third persons from associating or dealing with him." *Fernandez*, 65 Hawaii at 228. Further, these statements are clearly opinion as opposed to truth. *Gertz, supra.* Kekuna even referred to this difference between them as "manage-

ment style." As a matter of law, publishing this non-defamatory opinion of Kekuna does not constitute actionable defamation.

(b) The statements regarding standard operating procedures are as follows: "Before accepting this job I knew this area needed attention. . . . In essence, attention has not been given to annually reviewing these documents and updating them as necessary for so many years that it would require a major rewrite to make them current. My predecessor realized this and budgeted $45,000 for FY 85-86 to hire two planners for this purpose." He also said that "[i]t appears that [plaintiff] did not assume [the] responsibility" in the development of preparedness plans for natural disasters.

Again, there is no basis for a reasonable jury to find that these statements are defamatory under the Fernandez and Gertz standards. In fact, the statement that plaintiff also recognized the problem in this area and budgeted monies to correct it could be seen as reflecting positively on plaintiff.

(c) Essentially, the statements regarding failure to keep other staff members informed are found in the discussion above under isolation and "management style" and in the "Budget" section of the memorandum. In the "Budget" section, after noting that "[t]his item seems to have been well-planned and coordinated with budget personnel," Kekuna concludes: "The only area of concern here was stated in my previous discussion under 'Management' - keeping others informed."

As a matter of law, there is nothing defamatory in these statements.

d) Kekuna wrote: "There is evidence of loyalty to my predecessor by one individual. There is also evidence that this individual was given preferential treatment by my predecessor. I cannot prove these statements and therefore can only use caution in checking work accomplished by this individual."

Taken as a whole and given plaintiff's status as a public figure, this statement does not constitute legal defamation.

2. Statements by Fasi

On a radio talk show, in response to a caller's charge that plaintiff's demotion was "illegal", plaintiff alleges that Fasi stated plaintiff "botched Hurricane Iwa" and that he was incompetent. Plaintiff also alleges that Fasi attributed statements to plaintiff that were untrue.

(a) Fasi said of plaintiff ". . . as far as I'm concerned, botched

up the whole Iwa Hurricane situation." This clearly is Fasi's own opinion. This court finds that the phrase "As far as I'm concerned" is equivalent to "In my opinion". Statements which appear to be "fact" are not actionable if they are in fact opinions and made in "heated political debate." *Koch v. Goldway*, 817 F.2d 507, 509 (9th Cir. 1987).

Not only is this statement opinion rather than fact, it was made after an accusation that the demotion was "illegal" and during a time when plaintiff's removal was a major media/political event. As a matter of law, it is not defamatory.

(b) Plaintiff equates the statement above with calling him "incompetent". This court's conclusion above applies here as well.

(c) Fasi stated that he had a letter from plaintiff to Fasi in which plaintiff "castigates the incompetence, the wrongdoing, the complete inability of" General Lum, who is the head of the State Civil Defense Organization. Further, Fasi said plaintiff "in effect was saying that General Lum" is incompetent.

Truth is an absolute defense to a charge of defamation. *Bose Corp. v. Consumers Union of U.S., Inc.* 466 U.S. 485, 525 (1984). The January 2, 1985 memorandum from plaintiff to which Fasi was referring stated, in part:

> 1. I regret to report that the single most important problem affecting (OCDA) ability to carry out its public safety mission in the most effective manner is the impeditive and intransigent attitudes of and actions/ inactions by the State Director of Civil Defense, along with his Vice Director and Chief of the Plans and Operations Branch.
>
> 2. The excellent harmonious working relationships which existed between OCDA and State Civil Defense during your previous administration deteriorated seriously starting late in 1981 with the assignment of the present incumbents of the aforementioned positions. These individuals have attempted to change the policies and procedures in effect in the city during your administrations.

> 3. Despite our best efforts to restore good relations and clarify City and State roles, all attempts to arrange a modus vivendi, while protecting the interests and prerogatives of the City and County, have proved futile.
>
> 4. Continued failure by State Civil Defense to render proper support to the City and County seriously jeopardizes the safety of Oahu residents.

Fasi cannot be charged with defamation if what he said was true. As this memorandum shows, Fasi was in substance accurately relating the import of plaintiff's remarks. There is no defamation here.

3. Statements by Anderson

Plaintiff claims that Anderson, "in so many words and/or by innuendo" stated that plaintiff's continued administration of OCDA "was a threat to public safety, thereby implying that Plaintiff lacked the ability to perform the duties of administrator. . . ." (Complaint, p. 38.)

Anderson wrote a January 7, 1985 memorandum to all employees of OCDA stating that they were to look to Kekuna for guidance and direction in their duties at the agency. In a January 7,1985 news release, he outlined the struggle between the state and City civil defense agencies and concluded that this mutual "lack of confidence" constituted a jeopardy to the citizens of Oahu.

As seen above, plaintiff himself reached the same conclusion in his January 2nd memorandum to Fasi. He certainly cannot now claim that the same statement by Anderson is defamatory. The record before this court does not support the allegation that Anderson placed the blame on plaintiff. He merely pointed out the problem and indicated what the mayor could do to solve it: replace the head of OCDA.

On October 11, 1985, Anderson testified before the Civil Service Commission that it was his opinion at the time of plaintiff's demotion that plaintiff was not subject to the civil service rules. Those who testify before a Civil Service Commission are "absolutely immune from suits for damages arising out of their testimony." *Lentsch v. Marshall*, 741 F.2d 301, 304 (9th Cir. 1984). There is no legal basis for a claim of defamation as to these statements.

4. Statement by Fukuda

Defamation has also been alleged against Fukuda for her testimony before the Civil Service Commission as to her opinion that plaintiff's position was not civil service. For the same reason noted above, this testimony is absolutely shielded from liability. *Lentsch, supra.*

B. MALICE

Plaintiff cannot simply stand on his pleadings or assert that he will discredit defendants' testimony at trial on this issue of malice if he is to avoid summary judgment. *T.W. Elec., supra.* He has the affirmative obligation to come forward with significant probative evidence which tend to support his allegations. *Commodity Futures, supra.*

In this case, however, plaintiff has failed to provide a sufficient basis for his general contention that defendants acted with actual malice or reckless disregard in making the specific statements complained of. Plaintiff simply relies on his own conclusions drawn from defendants' ultimate conduct. These include the "fact" that he was demoted and that George Kekuna replace him. Plaintiff surmises this proves the statements, some of which were made after Kekuna replaced him, were made solely as a "cover-up" and that the defendants clearly did not believe them to be true.

This court finds that, taken together, a reasonable jury could not find "actual malice" or "reckless disregard for the truth" based on these "facts" alone. *Anderson, supra.*

For all of the reasons set forth above, summary judgment on Claim 12 (defamation) is granted in favor of all defendants.

IX. MOTION TO ABSTAIN, STAY OR DISMISS PROCEEDINGS

The gravamen of plaintiff's remaining allegations fall into two categories: (1) a violation of plaintiff's procedural due process rights giving rise to a claim under 42 U.S.C. § 1983 against the individual defendants in their personal capacities; and (2) numerous pendent state claims against all defendants. Although other grounds have been submitted to this court as bases for staying these proceedings, due to the nature of the remaining allegations, this court will first consider whether the doctrine espoused in *Parratt et al. v. Taylor*, 451 U.S. 527 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327 (1986), and its progeny is applicable.

The Court in *Parratt* quoted *Bonner v. Coughlin*, 517 F.2d 1311 (CA7 1975), *modified en banc*, 545 F.2d 565 (1976), *cert. denied*, 435 U.S. 932 (1978), with approval and adopted its conclusion in procedural due process cases stating:

> It seems to us that there is an important difference between a challenge to an established state procedure as lacking in due process and a property damage claim arising out of the misconduct of state officers. In the former situation the facts satisfy the most literal reading of the fourteenth Amendment's prohibition against "State" deprivations of property; in the latter situation, however, even though there is action "under color of" state law sufficient to bring the amendment into pay, the state action is not necessarily complete. For in a case such as this the law of Illinois provides, in substance, that the plaintiff is entitled to be made whole of any loss of property occasioned by the unauthorized conduct of the prison guards. We may reasonably conclude, therefore, that the existence of an adequate state remedy to redress property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law within the meaning of the fourteenth Amendment.

517 F.2d at 1319.

The *Parratt* Court held that the plaintiff had proven that a deprivation of procedural rights had occurred because of the state agents' failure to follow established state procedure.[20] It further found that the state had provided a remedy to persons "who believe they have suffered a tortious loss at the hands of the State." 451 U.S. at 543. Relying on *Bonner* and *Ingraham v. Wright*, 430 U.S. 651 (1977)[21],

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20 The Parratt reasoning does not apply to cases in which the deprivation of property is caused by conduct *pursuant* to established state procedure. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). However, such is not the case here.

21 *Ingraham* involved a claim that corporal punishment in public schools violated due process. The Court reached the same conclusion even though the act complained of was an *intentional* deprivation of a *liberty* interest as opposed to a negligent deprivation of a property interest.

the Court found that, even though state action was involved and the plaintiff's procedural rights were violated, the existence of the state's post-deprivation procedures satisfied the requirements of due process.

The Court went on to set forth the plaintiff's argument that state procedures did not adequately protect his interests as compared to a § 1983 action "because it (the state procedure) provides only for an action against the State as opposed to its individual employees, it contains no provisions for punitive damages, and there is no right to a trial by jury." *Id.* at 543 44. However, the Court refused to require that the state procedure be able to remedy all of plaintiff's alleged losses.

> Although the state remedies may not provide the respondent with all the relief which may have been available if he could have proceeded under § 1983, that does not mean that the state remedies are not adequate to satisfy the requirements of due process. The remedies provided could have fully compensated the respondent for the property loss he suffered, and we hold that they are sufficient to satisfy the requirements of due process.

Id. at 544.

Finally, the Court summarized the reasoning of its refusal to hold every tort or violation committed "under color of state law" actionable under § 1983.

> Such reasoning "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." Paul v. Davis, 424 U.S. 693, 701 (1976). We do not think that the drafters of the Fourteenth Amendment intended the Amendment to play such a role in our society.

Id. at 544.

As Justice Stewart observed in his concurring opinion:

> "[E]ven if Nebraska has deprived the respondent of this property in the constitutional sense,

> it has not deprived him of it without due process of law. By making available to the respondent a reparations remedy, Nebraska has done all that the fourteenth Amendment requires in this context.

Id. at 545.

The holding and reasoning of *Parratt* were specifically extended in *Hudson v. Palmer*, 468 U.S. 517, 533 (1983), to cover *intentional* acts as well as negligent ones. The *Hudson* Court also restated the rule: "that [plaintiff] might not be able to recover under these remedies the full amount which he might receive in a § 1983 action is not . . . determinative of the adequacy of the state remedies." *Id.* at 535 (citing *Parratt*, 451 U.S. at 544).

In footnote 14 at 533-34 of the Court's opinion, the Court recognized that this reasoning is equally valid when plaintiff is deprived of a property "interest" as well as physical property when it refers to *Ingraham, supra*, as the case which "foreshadowed" its ruling in *Hudson*.

Contrary to plaintiff's argument, in this case a "random and unauthorized" act, for purposes of *Parratt*, is defined as one contrary to commission regulations or city charter rules. *Hudson*, 468 U.S. at 533. That is precisely what plaintiff has alleged.

It is equally clear that the *Parratt* doctrine applies in civil cases as well and prisoner/criminal cases. *See Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 195 (1985); *McRorie v. Shimoda*, 795 F.2d 780 (9th Cir. 1986).

Although the holdings of *Parratt* and the cases that follow it (that procedural due process is not violated provided the state's legal system as a whole provides a constitutionally acceptable set of remedies) are not looked upon with favor by all legal writers,[22] it represents the current state of the law.

In this case, we have claims of negligent or intentional violations (depending on which alternative version of plaintiff's claims are accepted as true) of plaintiff's procedural due process rights relating to his property interest (freedom from demotion except for cause). (*Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1986) *cert. denied*, 481 U.S. 1029 (1987).) The City has a system, the Civil

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22 See: e.g. American Constitutional Law, Second Edition (1988) by Laurence H. Tribe. Chapter 10, § 10-14.

Service Commission, specifically designed to provide remedies to plaintiff for those violations. He has taken advantage of that system and its process is now pending. The question for this court becomes whether, on the facts of this case, the City's civil service system is sufficiently adequate to preclude plaintiff from bringing this § 1983 action for those same violations?

As noted above, the final commission decision was entered eleven months after plaintiff filed his appeal of his demotion. Although plaintiff argues that this delay amounts to a denial of a timely hearing, this court cannot find as a matter of law that it is one of constitutional proportions. *Loudermill*, 470 U.S. at 547. This court takes judicial notice of the fact that it is not uncommon for actions brought before Boards, Commissions and state and federal courts to take many months or even years before a hearing is held and a decision rendered. Were this delay to be a basis for an action under 42 U.S.C. §1983, the federal courts would be inundated with such actions because delay of some duration is the unfortunate rule in these proceedings rather than the exception.

Further, as the procedural history indicates, plaintiff is responsible for at least a share of the delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term "due process". Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient.

Once the Hawaii State Supreme Court has issued its decision on plaintiff's current appeal, the Civil Service Commission will be in a position to conduct a hearing and, if plaintiff prevails, has the power and authority to reinstate plaintiff in his prior position "under such conditions as it deems proper". Revised charter of the City and County of Honolulu. Section 6-308(2). As noted above, the fact that plaintiff may not be able to recover additional remedies available under § 1983 (i.e., damages for emotional distress, punitive damages, etc.) is not determinative of this issue if the remedies available are otherwise adequate. *Parratt, supra*, and *Hudson, supra*.

The state system also provides for appeal of commission decisions to the state courts, a process with which all parties to this case are familiar.

The court makes special note of *Punton v. City of Seattle*, 805 F.2d 1378 (9th Cir. 1986) *cert. denied*, 481 U.S. 1029 (1987), a case from this circuit with facts similar to those found here. In *Punton*, a member of the Seattle police department was summarily dismissed from his job without a hearing or being advised of the charges against him prior to his dismissal. upon appeal to the Seattle Public Safety Civil Service Commission, the Commission simply affirmed the dismissal without reaching the constitutional due process questions.

Punton appealed to the King County Superior Court where it was found that, due to the absence of pre-termination notice and hearing, Punton's due process rights were violated. The court found that Punton was entitled to reinstatement with back pay and was awarded attorney's fees. The Washington Court of Appeals affirmed the reinstatement but reversed the attorney's fees award. The court held that Punton was entitled to only those remedies available in the administrative proceeding and those remedies did not include attorney's fees.

Prior to the decision by the Washington State Court of Appeals, Punton filed a 42 U.S.C. § 1983 claim in U.S. district Court seeking emotional distress damages and attorney's fees for his constitutional deprivations. Summarizing the facts of that case, the district court stated:

> In this case, the undisputed facts are that Punton lost his job without any kind of a hearing. He immediately complained, received a civil service hearing, and *in due course*, was reinstated with back pay. By resorting to post-deprivation state court process, he received everything he had lost, but he did not receive supplemental damages for emotional distress or attorney fees. The crucial question, therefore, is whether Punton, who after losing his job, obtained the incidental relief afforded by the law that created his job, is now entitled to additional relief in federal court under §1983, for damages not available in state court under the type of procedure that he chose to follow. (Footnote omitted). In short, the question properly before the district court, was whether or not Punton is entitled to something more and, if so, what more. (Emphasis added.)

805 F.2d at 1380.

The only difference between *Punton* and this case is that the city system here has not yet reached a final conclusion. That process is still pending and, as noted above, the only conclusion reached thus far (the civil service issues) was in plaintiff's favor. Therefore, this court is not in a position to determine that the delay of which plaintiff complains is so long or so unreasonable that it requires a finding that the entire city system is constitutionally defective. While the system established to remedy plaintiff's grievances has not run its course, this court takes the teachings of *Punton* to mean that, as long as that system is working and is not fundamentally deficient, plaintiff has not been deprived of the due process that system affords.

Therefore, under *Parratt* and its progeny, especially *Punton*, the remaining portions of plaintiff's federal complaint (Civil No. 86-1136) must be dismissed without prejudice.

The issues in the state court complaint (Civil No. 88 00375) remaining after this order are based on alleged violations of state law, the Revised Charter of the City & County of Honolulu and 42 U.S.C. § 1983. The § 1983 claim found in that complaint is capable of being heard in state court and is based on the same alleged violations which make up his other state claims. While this court is compelled to dismiss the federal complaint as discussed above, it is the court's finding that, if plaintiff is to have an adequate remedy available to him in the state forum and an opportunity for the full reaches of the due process justice requires, he must be allowed to pursue his additional claims in the state court.

Based upon the discussions elsewhere in this order, it is also clear to this court that, although plaintiff was not prohibited from filing a complaint here, his case more appropriately belongs in the state court system.

Plaintiff has argued that he would be disadvantaged if he is not allowed to proceed in this court and must resort to the state court and Civil Service Commission for relief. It is evident that the state system, the Civil Service Commission and subsequent state court review, provides adequate redress for plaintiff's complaints. Because the § 1983 claims are based on a deprivation of *procedural* due process, that post-deprivation process given to plaintiff affords him more than sufficient due process. *Parratt, supra*, et al.

As noted previously, U.S. District Judge Ideman issued a stay before plaintiff had charged the members of the Commission with

bias against him. Judge Ideman based that stay on the rationale of *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941). He found that plaintiff's claims involved unsettled questions of state law which, when settled, would obviate the necessity of deciding federal constitutional issues. He further ruled that the state courts should be given the opportunity to make those decisions. Thereafter, plaintiff challenged the make-up of the Commission itself which resulted in the appeal to the Hawaii State Supreme Court which is still pending. After that challenge was originally made and in order to avoid Judge Ideman's stay, plaintiff filed his state court complaint which was subsequently removed to this court.

What Judge Ideman was facing when he lifted the stay was a charge of bias of the Commission and a recently filed state complaint which also included a claim of bias. On May 23, 1988, Judge Ideman vacated his stay because, under the circumstances existing at that time, he was not convinced that the commission could provide plaintiff with the full relief he was seeking. However, with the severance of Civil 88-00375 and its remand to state court, plaintiff will now have available to him both the commission proceeding and his state court action and will have the opportunity to present his pending claims and obtain all the relief to which he may be entitled.

This court has the discretion to remand the remaining portion of Civil NO. 88-00375 *sua sponte*. *Price v. PSA, Inc.*, 829 F.2d 871, 874 (9th Cir. 1987); *cert. denied., Psgroup v. United States District Court for the Southern District of California*, U.S. , 108 S.Ct. 1732 (1988). Accordingly, based upon the foregoing, the order consolidating Civil No. 86 1136 and Civil No. 88-00375 filed September 6, 1988 is dissolved; that portion of Civil No. 88-375 remaining after the disposition of the motions herein is remanded to the state court for further proceedings; and, that portion of Civil No. 86-1136 remaining after the disposition of the motions herein is dismissed without prejudice.

X. MOTION FOR RULE 11 SANCTIONS

Defendant Fukuda moves for Rule 11[23] sanctions against plaintiff's counsel for : 1) including Claim 7 (implied covenant of good faith and fair dealing) in his complaints; and, 2) refusing to eliminate the claim when such a demand was made by defendant's counsel.

Although there is no legal basis in Hawaii for this cause of action, this court does not find its inclusion in these complaints an appropriate basis for invoking Rule 11 sanctions under present criteria set forth by the Ninth Circuit Court of Appeals. Being only one of fifteen and seventeen claims respectively, defendants have made no showing of prejudice in time or expense occasioned by the addition of this claim. Certainly, it should not have been included and must now be removed. However, given this lack of showing of prejudice to defendants, this court finds Rule 11 sanctions inappropriate here.

Defendants' Motion for Rule 11 Sanctions is therefore denied.

CONCLUSION

Based on the above legal and factual discussion and conclusions and the authorities cited herein, this court orders as follows:

(1) The following motions filed in these consolidated cases are determined as follows:[24]

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23 Fed. R. Civ. P. 11 is designed to insure the accuracy of pleadings and to insure that the content of pleadings are not designed to harass or delay: i.e., they are well grounded in law or in fact. That portion of the rule relevant to defendant's motion is as follows:

> . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

24 As noted above, all defendants have either authored or joined in all other defendants' motions. Therefore, the disposition of each of these motions is equally applicable to all defendants. Furthermore, the disposition of these motions are equally applicable to both Civil No. 86-1136 and Civil No. 88 00375.

(a) Plaintiff's Motion for Partial Summary Judgment feild August 15, 1988 as to Claims 1, 2 and 3 (issue: civil service) is GRANTED;

(b) Plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claim 3 is DENIED;

(c) Defendant City's Motion for Partial Summary Judgment filed August 16, 1988 as to Claims 1, 2, 3, 4, 6, 7, 10, 11, 12, and 13 (that portion relating to breach of contract) on behalf of all defendants in all capacities is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 1 (that portion relating to substantive due process and equal protection), 6,7, 10, 11 and 12 as to all defendants in all capacities;

(ii) this motion is GRANTED as to Claims 2 and 4 as to the City, the Civil Service Commission and all individual defendants in their *official* capacities;

(iii) the remainder of this motion is DENIED.

(d) Plaintiff's Motion for Partial Summary Judgment filed January 4, 1989 as to Claims 1, 2, 3 and 14 (issue: Kekuna unlawfully appointed) is DENIED;

(e) Defendant Anderson's Motion to Stay Proceedings or To dismiss filed January 6, 1989 is GRANTED as set forth under No. (4) below;

(f) Defendant City's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) those parts of this motion dealing with the delay of the Civil Service Commission, defendant Harris, the applicability of Hawaii Rev. Stat. Chapter 76 to the City & County of Honolulu and Claim 4, 9 and 13 (that portion relating to breach of contract) are GRANTED;

(ii) the remainder of this motion is DENIED.

(g) Defendant Anderson's Motion for Summary Judgment in his individual capacity filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12, and 13 (that portion relating to breach of contract);

(ii) the remainder of this motion is DENIED.

(h) Defendant Anderson's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to Claim 12 is GRANTED;

(i) Defendant Fasi's Motion to Dismiss or for Summary Judgment filed January 17, 1989 as to Claim 12 is GRANTED;

(j) Defendant Fasi's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12 and 13 (that portion relating to breach of contract);

(ii) this motion is GRANTED as to Claims 2 and 4 in Fasi's official capacity;

(iii) the remainder of this motion is DENIED.

(k) Defendant Fukuda's Motion to Dismiss or for Partial Summary Judgment filed January 17, 1989 as to all claims is GRANTED in part and DENIED in part as follows:

(i) this motion is GRANTED as to Claims 6, 7, 9, 10, 11, 12 and 13 (that portion relating to breach of contract);

(ii) the remainder of this Motion is DENIED.

(l) Defendant Fukuda's Motion for Rule 11 sanctions filed January 17, 1989 is DENIED;

(m) Defendant City's Motion to Dismiss Civil Service Commission and its members and all individuals in official capacities filed January 25, 1989 is GRANTED;

(n) Defendant Fukuda's Cross-Motion for Summary Judgment filed January 27, 1989 as to all claims except Claim 12 is DENIED.

(o) All motions or parts thereof not specifically identified in this list are hereby DENIED;

(2) The order consolidating Civil No. 86-1136 and Civil NO. 88-00375 dated September 6, 1988 is DISSOLVED;

(3) That portion of Civil No. 88-00375 remaining after disposition of the motions as set forth herein is REMANDED to the state court for further proceedings; and,

(4) That portion of Civil No.86-1136 remaining after disposition of the motions as set forth herein is DISMISSED without prejudice, all parties to bear their own costs.

(5) Those cross-claims filed against the City for contribution and indemnity are reserved for determination in the state court proceedings.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii March 3, 1989.

David A. Ezra (signed)

UNITED STATES DISTRICT JUDGE

Malcolm A. Sussel v. City and County of Honolulu, et al.; Civil Nos. 86-1136 and 88-00375; DECISION ON PLAINTIFF'S AND DEFENDANTS' VARIOUS MOTIONS FOR SUMMARY JUDGMENT, TO DISMISS, TO STAY PROCEEDINGS, AND FOR OTHER RELIEF

APPENDIX D

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL,

CIVIL NOS. 86-1136
88-00375

Plaintiff,
vs.
CITY AND COUNTY OF HONOLULU,et al.

Defendants.
April 21, 1989

ORDER GRANTING IN PART AND DENYING IN PARTPLAINTIFF'S AND DEFENDANTS' MOTIONS FOR RECONSIDERATION, DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND MOTION TO SET CASE FOR TRIAL, FOR DISMISSAL OF CERTAIN CLAIMS AND FOR REMAND

I. MOTIONS FOR RECONSIDERATION

Plaintiff and several defendants have requested reconsideration of this court's Decision on Plaintiff's and Defendants' Various Motions for Summary Judgment, to Dismiss, To Stay Proceedings, and For Other Relief filed March 3, 1989 (hereinafter "March 3 Decision").[1] Careful consideration has been given to each of the various arguments, both factual and legal, made in support of these

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1 On March 16, 1989, Defendant Fasi filed a Motion For Reconsideration, Alteration, Amendment and/or Clarification of this court's "March 3 Decision" which is joined by defendants Kekuna, Fukuda and Anderson and opposed by plaintiff and, in part, by defendant City. On March 17, 1989, plaintiff filed a Motion For Reconsideration and/or Clarification of that "March 3 Decision" which is opposed by all defendants. A detailed statement of facts and claims is found in the "March 3 Decision" at pp. 1-9.

motions. Except as specifically indicated below, plaintiff's and defendants' motions for reconsideration are DENIED for the reasons set forth in the "March 3 Decision". The court further finds as follows:

A. *Plaintiff's January 16, 1989 Motion for Partial Summary Judgment Omitted From "March 3 Decision"*

Plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 was not separately addressed in the "March 3 Decision". However, the issues contained in that motion were disposed of by the rulings as to plaintiff's Motion for Partial Summary Judgment filed August 15, 1988 as to Claims 1, 2 and 3 and the City's Motion to Dismiss or For Summary Judgment filed January 17, 1989. (*See*: "March 3 Decision", p. 50 at ph. (1)(a) and p. 51 at ph. (1)(f)(i)).

Therefore, in accord with that portion of the "March 3 Decision" finding that plaintiff was a civil service employee while Administrator of OCDA, plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 is GRANTED.[2]

B. *Defendants' claim That Findings Regarding The U.S. Constitution Are Res Judicata As To State Constitutional Issues*

Defendants argue that plaintiff's claims of violation of the equal protection and due process clauses of the Hawaii State Constitution must be dismissed because this court found no violation of, and thus dismissed claims premised upon, the due process and equal protection clauses of the United States Constitution.[3] Defen-

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2 That finding was based on the City's civil service rules. Plaintiff claims it should also be based on state law. However, this court specifically finds that Chapter 76, Hawaii Revised Statutes, does not apply to the City and County of Honolulu. *Gibb v. Spiker*, 68 Hawaii 438, 718 P.2d 1076, 1079 (1986) ("[T]he City and County of Honolulu does not appear subject to HRS Chapter 76."). Further, as plaintiff has stated: "Chapter 76 of the Hawaii Revised Statutes . . . does not constitute the basis upon which Plaintiff is presently asserting his arguments to civil service coverage." (Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment filed August 27, 1988, p. 59.)

3 "March 3 Decision" at pp. 23-25.

dants contend that ruling is res judicata as to plaintiff's alleged state constitutional claims in state court. While defendants may be correct, this determination is more properly within the province of the state courts after remand. Defendants' motion must therefore be denied.

C. *Clarification Regarding Reference To Corporation Counsel Opinion Reaffirming Civil Service Status*

Page 3 of the "March 3 Decision" states: "In addition, in December 1984, the Corporation Counsel, legal advisor to the City, restated an earlier opinion that the Administrator's position was in fact subject to civil service commission rules." On page 13 of the "March 3 Decision", it is noted: "As previously indicated, in 1984, the Corporation Counsel again reaffirmed its opinion." The specific date of the opinion referred to is in error.

The initial Corporation Counsel opinion is correctly stated as October 22, 1981. ("March 3 Decision" at 13). However, the confirming Corporation Counsel opinion referred to above was dated August 13, 1982, not December 1984. This, however, in no way alters or affects the court's reasoning or conclusions.

Nonetheless, the correct date of that Corporation Counsel opinion should be noted.[4]

D. *Qualified Immunity Issue Is Now Moot*

Defendant Anderson contends that, with the dismissal of the 42 U.S.C. § 1983 claims, the issue of qualified immunity is now moot. In the alternative, he claims this court applied an erroneous legal standard in denying defendants' summary judgment motions on this issue.

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4 The December 1984 opinion regarding plaintiff's civil service status was via a telephone call from Wallace Y. Kunioka, then Director of Civil Service of the City and County of Honolulu, to defendant Fasi. His statement is found in his affidavit dated August 25, 1988 at page 4, paragraph 10, which is attached as an exhibit to Plaintiff's Memorandum in Opposition to Defendants' Motion for Partial Summary Judgment dated August 27, 1988. Mr. Kunioka's statement reads: "I told Frank F. Fasi in a telephone conversation in late December 1984 that Malcolm Sussel as Administrator of OCDA was a civil service employee. Mr. Fasi said in response to me, 'We'll see about that'."

While this court is confident that the correct legal standard was applied, it nevertheless agrees that a determination of this issue has now been rendered moot. As correctly noted by Anderson, the issue of qualified immunity is irrelevant to the remaining pendent state tort claims. The related legal standard for those claims is respondeat superior which was not an issue raised in these motions. Therefore, that portion of this court's "March 3 Decision" relating to the issue of qualified immunity is withdrawn and the issue declared moot.

E. *Dismissal of 42 U.S.C. § 1983 Claims Of Civil No. 88- 00375*

Following the *Parratt* doctrine, this court dismissed the 42 U.S.C. § 1983 claims found in Civil No. 86-1136.[5] (*See: Parratt v. Taylor*, 451 U.S. 527, 542 (1981) and *Bonner v. Coughlin*, 517 F.2d 1311, 1319 (7th Cir. 1975)). Defendant Fasi argues that the same reasoning applies equally to plaintiff's 42 U.S.C. § 1983 claims in Civil No. 88-00375. This court agrees. Accordingly, the 42 U.S.C. § 1983 claim (Claim 2) and the claim of conspiracy to violate 42 U.S.C. § 1983 (Claim 4) of Civil No. 88-00375 are hereby dismissed without prejudice.

F. *Defendants' Requests Re: Timing And Sequence of State Proceedings*

Defendant Fasi requests an order requiring plaintiff to complete the City civil service commission proceedings before continuing with his state court litigation. Defendant Anderson submits that this court should make it clear that it is not attempting to impose such a requirement.

It would be wholly inappropriate for this court to attempt to impose its own sense of timing or sequence of proceedings upon the state court or Civil Service Commission. These decisions are appropriately within the province of those state and city forums. Defendant Fasi's motion must therefore be denied.

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5 "March 3 Decision" at pp. 38-46.

II.PLAINTIFF'S MARCH 17, 1989 MOTION FOR PARTIAL SUMMARY JUDGMENT

On March 17, 1989, plaintiff filed another Motion for Partial Summary Judgment seeking his reinstatement as Administrator of OCDA based on his demotion "without cause". This motion was filed the same day the order vacating this court's previous remand of all remaining claims to state court was filed. While it is unclear whether these claims were still on remand when the motion was filed, for the following reasons plaintiff's motion is denied.

First, this court's prior order required all dispositive motions to be filed in this case no later than January 17,1989. Plaintiff's motion was clearly filed in violation of that order.

Second, this motion is merely a restatement of plaintiff's prior motion for partial summary judgment on his third claim filed August 15, 1989. In that motion, plaintiff asserted that, as a matter of law,

> "[d]efendants violated the City's civil service laws when the City... [demoted plaintiff] without, among other things, ... (1) ten days prior written notice to him ... *and/or, in the alternative, (2) without just or good cause based upon his competence or ability to perform his duties as Administrator.*" (Emphasis added.)

For reasons set forth in the "March 3 Decision" with respect to the denial of plaintiff's August 15 motion, this motion is also denied.

III. REMAND

Pursuant to the "March 3 Decision" and this order, Civil No. 86-1136 has been dismissed in its entirety. All federal claims and several pendent state claims in Civil No. 88 00375 have also been dismissed. The only issues remaining in Civil No. 88-00375 are premised on state claims. Therefore, pursuant to 28 U.S.C. § 1441 (c) and *Carnegie-Mellon University v. Cohill*, U.S. , 108 S.Ct. 614, 618-19 (1988), the remaining claims in Civil No. 88-00375 after disposition of the "March 3 Decision", as amended by Order dated March 17, 1989 and this order, are remanded to state court.

IV. CONCLUSION

Based upon the foregoing:

1. Plaintiff's and Defendant Fasi's Motion for Reconsideration are GRANTED in the following particulars;

a. Plaintiff's Motion for Partial Summary Judgment filed January 6, 1989 is GRANTED as set forth above;

b. The court's prior ruling on the issue of qualified immunity is WITHDRAWN and the issue declared MOOT;

c. The request for this court to order the timing and/or sequence of subsequent state and city proceedings and for a list of parties and claims remaining is DENIED;

d. Claims 2 and 4 of Civil No. 88-00375 are DISMISSED without prejudice;

2. In all respects except those specifically mentioned in paragraph 1 above, plaintiff's and defendant Fasi's Motions for Reconsideration are DENIED;

3. Plaintiff's Motion for Partial Summary Judgment filed March 17, 1989 is DENIED;

4. That portion of Civil No. 88-00375 remaining after this court's "March 3 Decision", as amended by Order dated March 17, 1989 and this Order, is REMANDED to the state court for further proceedings; and,

5. Plaintiff's Motion to Set Case for Trial filed March 17, 1989 if DENIED as moot.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii _____.

David A. Ezra (signed)
DAVID A. EZRA
UNITED STATES DISTRICT JUDGE

Malcolm A. Sussel v. City and County of Honolulu, et al.; Civil Nos. 86-1136 and 88-00375; ORDER GRANTING PLAINTIFF'S AND DEFENDANTS' MOTIONS FOR RECONSIDERATION, DENYING PLAINTIFF'S MOTION OF PARTIAL SUMMARY JUDGMENT AND MOTION TO SET CASE FOR TRIAL, FOR DISMISSAL OF CERTAIN CLAIMS AND FOR REMAND

APPENDIX E

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 89-15652
D/CT#: CV-86-1136-DAE

NO. 89-15697
D/CT#: CV-86-1136-DAE
May 9,1991

MALCOLM A. SUSSEL

Plaintiff-Appellant

v.

CITY AND COUNTY OF HONOLULU; FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu, JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS, MOISES L. TACAZON; PATRICIA K. Y; ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu

Defendants - Appellees

NO. 89-15777
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL

Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu

Defendant - Appellant

NO. 89-15778
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL

Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu

Defendant - Appellant

NO. 89-15779
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL
Plaintiff- Appellee

v.

CITY AND COUNTY OF HONOLULU et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu

Defendant - Appellant

NO. 89-15780
D/CT#: CV-86-1136-DAE

MALCOLM A. SUSSEL
Plaintiff - Appellee

v.

CITY AND COUNTY OF HONOLULU et al.,

Defendants

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu

Defendant - Appellant

APPEAL FROM the United States District Court for the U.S. District Court for the District of Hawaii.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the U.S. District Court for the District of Hawaii and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED IN PART AND VACATED AND REMANDED IN PART.

Filed and entered 12/6/90, amended 2/7/91.

APPENDIX F

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,

No. 89-15652
D.C. No. 86-1136-DAE

Plaintiff-Appellant,

No. 89-15697
vs.
D.C. No. 88-0375-DAE

ORDER
March 7, 1991

CITY AND COUNTY OF HONOLULU; FRANK FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. Y' ISABEL M. TAGALA, in their official capacities as Commissioners of the City and County of Honolulu,

Defendants-Appellees.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15777
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of the Civil Service of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15778
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,

Plaintiff-Appellee,

No. 89-15779
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et al.,

Defendants,

and

D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu,

Defendant-Appellant.

MALCOLM A. SUSSEL,
Plaintiff-Appellee,

No. 89-15780
vs.
D.C. No. 86-1136-DAE

CITY AND COUNTY OF HONOLULU, et. al.,

Defendants,

and

GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu,
Defendant-Appellant.

Before: FARRIS, PREGERSON, and RYMER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

(2)

FILED
SEP 11 1991
OFFICE OF THE CLERK

No. 91-88

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MALCOLM A. SUSSEL,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

Of Counsel:
DEVENS, LO, YOUTH,
NAKANO & SAITO
PAUL DEVENS
Counsel of Record
1600 Central Pacific Plaza
220 South King Street
Honolulu, Hawaii 96813
Tel. No. (808) 521-1456

Attorney for Respondent
City and County of Honolulu

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's claim to a right of political belief and association under the First Amendment.

2. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's claim that he was denied due process under the Fourteenth Amendment.

3. Whether or not the Ninth Circuit Court of Appeals erred in affirming the District Court's grant of the City and County of Honolulu's motion for summary judgment dismissing Petitioner's civil rights claims under 42 U.S.C. § 1983.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

No. 91-88

MALCOLM A. SUSSEL,

Petitioner,

vs.

CITY AND COUNTY OF HONOLULU, et al.,

Respondents.[1]

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT CITY AND COUNTY OF HONOLULU'S BRIEF IN OPPOSITION

I.

COUNTERSTATEMENT OF THE CASE

Respondent City and County of Honolulu (herein "City") disagrees with the statement of facts presented by the Petitioner in instances too numerous to point out individually within the space limitation of this brief. Therefore, categories of erroneous statements will be pointed out together with a counterstatement of the case.

Petitioner repeatedly erroneously characterizes the personnel action taken by the City with respect to himself as a "demotion" and thereafter builds specious legal arguments thereon.

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[1]The District Court's Order granting the City's motion to dismiss all the individual parties sued in their official capacities was not appealed by the Petitioner; however, the District Court did not dismiss the action against the individuals sued in their personal capacities. Therefore, counsel for the City represents the City only; the individual Respondents remain as parties in their personal capacities and are represented by separate counsel.

In the first five Questions Presented for Review, Petitioner frames the questions on the repeated erroneous assumption that the personnel action taken was a "demotion."

Moreover, in the first five of the Reasons for Granting the Writ set forth at pages 11 through 26 of the Petition, the arguments rest again on the repeated erroneous assumption that the personnel action was a "demotion."[2] As will be demonstrated below, the removal of this assumption causes the due process arguments of Petitioner to collapse and, as held by the District Court and affirmed by the Ninth Circuit, to be without merit.

Rather than a demotion, the Ninth Circuit found that,

> The dispute is not whether demotion is an interest protected by the due process clause but whether Sussel was demoted or merely downwardly reallocated.

Petitioner's Appendix A at p. 8a.

Petitioner also makes repeated reference in his Statement of the Case to his having been "replaced" in his position or "removed" from his position or to his "replacement" or "removal," all such words being conceptually consonant with the theory of demotion. Here, too, this repeated erroneous statement, once removed as a basis for his legal arguments, causes Petitioner's First Amendment argument likewise to be without merit.

Since the Ninth Circuit determined that the question was whether or not Sussel was demoted or downward reallocated, the question of whether or not he was ever replaced or removed never arose.

The difference between a "demotion" and a "downward reallocation" is legally significant.

Under the City's Civil Service Rules, a "demotion" is a personnel action involving the removal of an employee from a

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[2]Since Petitioner did not include Question 6 of the Questions Presented for Review among the reasons for the grant of certiorari, Respondents will not respond to Question 6 nor to Reasons for Granting the Writ numbered VI which is the counterpart to Question 6.

particular position and placing him in a lower position at a lesser pay. In a "downward reallocation," the employee remains in his particular position, but the duties of the position are redefined or reclassified to lesser ones, but at the same time the employee maintains his basic pay by way of temporary differential pay, a process known as "red circling." A demotion is considered a disciplinary action while a downward reallocation is not. The former process is protected by due process; the latter is not. *See* Ninth Circuit Opinion, Petitioner's Appendix A at p. 8a.

The relevant and material facts are as follows:

On January 2, 1985, the Respondent Mayor Frank F. Fasi ("Fasi") was sworn into office as Mayor of the City and County of Honolulu. Under the immediate prior Administration, the Petitioner ("Sussel") was appointed to the position of "Executive Assistant I, Position No. CD 300" in the City's Civil Defense Agency. Respondent City and County of Honolulu ("City") conceded that Sussel was a civil servant and that the position he occupied was in the City's Civil Service. Prior to Fasi being sworn into office as Mayor, Sussel publicly claimed in the local news media that Fasi intended to remove Sussel from his position and to replace him with a political appointee. Sussel had his government union attorney write a letter to Fasi in December 1984, before he took office as Mayor, advising Fasi that he was without power to remove Sussel from his civil service position.

On the day Fasi was sworn in, he appointed Respondent George Kekuna ("Kekuna") to a position in the office of the Managing Director, with the official title "Executive Assistant II," Position No. MD 134, and also referred to as "Deputy Director-Designate, Oahu Civil Defense Agency." Under the City Charter, the Managing Director is the principal management aide to the Mayor and is mandated to "[s]upervise the heads of all executive departments and agencies assigned to the managing director . . . ." Section 6-102(a) of the Revised Charter of the City & County of Honolulu 1973 (1984 Edition). Appendix A at p. 1a. This management supervision was carried out by the Managing Director through the use of executive assistants assigned to various departments and agencies of the City. It is uncontroverted that under the City Charter the City's

Civil Defense Agency, headed by a Civil Defense Administrator, is an executive agency subject to the Managing Director's supervision. In the prior Administration, pursuant to this authority in the Managing Director, Sussel was supervised by an executive assistant assigned to and holding a position in the Managing Director's office. After Fasi was sworn in, Sussel held the exact same position that he occupied before the Mayor's election. He continued to be supervised by the Managing Director's office through Kekuna who was an Executive Assistant in the Managing Director's office. Moreover, the Managing Director advised Sussel he would not be removed from his position. Sussel was never removed and, in fact, still occupies Position CD 300 but with redefined duties.

Sussel objected to the supervision by the Managing Director's office and refused to recognize Kekuna as the Managing Director's Executive Assistant. Sussel claimed that by virtue of such supervision, he had been stripped of his responsibilities but yet was left with liability in the event an injured third party made a legal claim against him for some alleged negligence by the Civil Defense Agency. CR 139, Exhibit S at p. 120; CR 472, Exhibit 8 at pp. 66, 67, 75, 76.[3] Sussel insisted that a meeting be held to resolve this dilemma. A meeting was held on January 9, 1985, with the City's Managing Director, Civil Service Director and Corporation Counsel. Sussel attended with his union representative and union lawyer who demanded the prompt resolution of the "loss of responsibility — continued liability" dilemma or else they would bring a lawsuit against the City. The day after the meeting, Sussel wrote to the Managing Director wherein he reiterated his objection of having to "answer to Mr. Kekuna," and again expressed his concern about being held "liable in the event of an emergency." CR 399, Exhibit 1.

The City officials determined that the only legal means under the City's Civil Service Rules by which they could resolve the dilemma, and thereby satisfy Sussel, without causing him any loss in pay, would be by way of a downward reallocation (reclassification) of Sussel's position but with a pay differential

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[3]CR refers to the Clerk's Record in DC 86-1136.

in order to maintain his basic pay. CR 121, Exhibit I at pp. 79, 80, 138, 139, 140, 190, 205; CR 472, Exhibit 8 at p. 68. Under those processes, the responsibilities attached to the position, which Sussel claimed he did not have, would be removed and thus the issue of potential tort liability would be resolved while still maintaining Sussel's basic salary.

The civil service process effecting the reclassification was commenced on January 11, 1985, with written notice thereof to Sussel on January 18, 1985. CR 394, Exhibit D; CR 395, Exhibit 13D. On January 25, 1985, before the "downward reallocation" or reclassification was to take effect on February 1, Petitioner appealed the proposed personnel action to the City's Civil Service Commission contending that the action was tantamount to a demotion, and was not a downward reallocation. CR 139, Exhibit B at p. 8; CR 121, Exhibit F. He complained that he did not receive the required ten-day written notice together with a showing of "cause" called for under the Civil Service Rules in the case of a demotion. Within a few days of receiving this notice, Sussel absented himself from his employment for a period of approximately one year.

On January 7, 1986, the City's Civil Service Commission decided that Sussel's position was not within the City's Civil Service system. Sussel appealed that decision to the State Circuit Court which, on May 22, 1987, reversed the Commission and ruled that Sussel's position was in the City's Civil Service, and remanded the matter back to the City's Civil Service Commission for appropriate proceedings. However, before the State Circuit Court ruling was handed down, Sussel filed a 45-page complaint in the U. S. District Court for the District of Hawaii, Civil No. 86-1136, under 42 U.S.C. § 1983 and pendent state claims for, amongst others, alleged deprivation of his constitutionally guaranteed due process and freedom of political belief and association rights.

After the State Circuit Court remanded the matter back to the City's Civil Service Commission, Sussel also sued in the State Court seeking the removal of several Civil Service Commission members on the grounds of bias (including one member who voted in his favor). The State Circuit Court found one member of the Commission biased, but denied Sussel's request for injunctive relief to bar the Civil Service Commission from

hearing Sussel's claim. CR 395, Exhibit 17 at p. 12. Sussel appealed this decision to the State Supreme Court. On Sussel's motion before the State Supreme Court, further Civil Service Commission action was stayed pending the State Supreme Court's resolution of Sussel's appeal.

On April 29, 1988, Sussel filed a second complaint in the State Circuit Court, which, but for the addition of two more claims, was virtually identical to his complaint originally filed in the U. S. District Court for the District of Hawaii, Civil No. 86-1136. In this complaint, Sussel alleged that he was "forced against his will" to file this second complaint. 2ER 1, Exhibit B at p. 2. That state action was removed to the U. S. District Court for the District of Hawaii under Civil No. 88-00375.

Sussel's consolidated complaints before the U. S. District Court for the District of Hawaii alleged some 17 causes of action, including, *inter alia*, a violation of due process guaranteed under the Fourteenth Amendment to the United States Constitution, a violation of First Amendment rights of free speech, and a violation of 42 U.S.C. § 1983. ER 1; 2ER 1, Exhibit B; CR 150.[4]

Some 14 separate motions were filed by Sussel and some of the Respondents in the District Court. All motions (except two, not pertinent to this Petition) were for summary judgment, partial summary judgment or to dismiss part or all of Sussel's complaints, with the latter being converted to motions for summary judgment because matters outside the pleadings were considered.

Following the remand to the State by the District Court, Sussel appealed the personnel action taken by the City's Civil Service Director to the City's Civil Service Commission. In December 1990, he had a full blown hearing before a Special Master duly appointed by the City's Civil Service Commission. Sussel filed his prehearing statement with the Commission naming approximately 200 witnesses to be called, which included U.S. District Court Judge David A. Ezra who granted the City's motion for summary judgment dismissing Sussel's federal

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[4]ER and 2ER refer to Excerpts of Record in DC 86-1136 and DC 88-00375, respectively, filed in the Ninth Circuit. These cases were consolidated in the District Court. *See* n. 3 for CR reference.

claims and who remanded the matter back to the Civil Service Commission. Sussel's witness list also included the attorneys for Fasi and the City. In submitting a similarly lengthy prehearing statement of witnesses on August 18, 1988, Sussel's attorney estimated that each witness would be examined for a total of three hours. CR 140, Exhibit F.[5]

The Special Master, independently of the Ninth Circuit's Memorandum Decision, narrowed the issues to be decided by him as 1) whether or not the personnel action taken by the City through its Department of Civil Service was a "downward reallocation" or a "demotion," and 2) whether or not the personnel action taken, however characterized, was politically motivated.

The appeal of the Civil Service Director's personnel action was an adversary hearing before the Special Master and extended over the course of 11 days after numerous prehearing motions had been heard. Voluminous written and lengthy oral evidence was presented, which was thereafter supplemented with extensive post-hearing briefs, proposed findings of fact and conclusions of law.

Thereafter, the Special Master, with reasonable diligence, offered proposed findings of fact, conclusions of law and a proposed decision and order to the effect that the personnel action was a demotion, but was not politically motivated.

Promptly after the receipt by the Commission of the Special Master's proposals, the parties were allowed further arguments before the full Civil Service Commission on exceptions taken by them to the Special Master's proposals. On June 26, 1991, the Civil Service Commission, upon a review of the record developed by the Special Master, duly adopted its own findings of

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[5]The government employees' union lawyer, Charles K.Y. Khim, who initially represented Sussel before the City's Civil Service Commission, withdrew his appearance on the eve of the commencement of the taking of evidence by the Special Master in December 1990. This withdrawal by counsel was apparently prompted by the filing in the previous month by Sussel of (1) unfair labor practice and (2) prohibited practice complaints before the Hawaii Labor Relations Board against the government employees' union. Mr. Khim felt this action placed him in a conflict of interest under the Hawaii Bar's Code of Professional Responsibility. *See* Affidavit of Charles K.Y. Khim, Appendix B at pp. 3a, 4a.

fact, conclusions of law and decision and order.

The Civil Service Commission disagreed with the Special Master and found that the personnel action taken by the City's Director of Civil Service was a reasonable exercise of discretion given to her and, in effect, was a downward reallocation as defined by Civil Service Rules, and not a demotion. On the other hand, the Commission agreed with the Special Master that the personnel action was taken without any political motivation on the part of the City and its officials. *See* Civil Service Commission's "Final Decision and Order," Appendix C at p. 6a. Since the Commission concluded that there was no demotion, Sussel's request for reinstatement was rendered moot.

On July 10, 1991, Sussel filed an appeal of the Civil Service Commission's actions, pursuant to the State Administrative Procedure Act and the Hawaii Rules of Civil Procedure, to the State Circuit Court. Thus, Sussel has completed the administrative process and has now triggered the judicial process provided by state law that will determine "the property interest in question," if any.[6]

II.

SUMMARY OF ARGUMENT

The Ninth Circuit's December 6, 1990 Memorandum Decision, as amended by its February 7, 1991 Order, properly affirmed the District Court's summary judgment disposition of all of Sussel's federal claims, and did not give rise to any special and important reasons that would support this Court's review on writ of certiorari. *See* Petitioner's Appendices A and B. Moreover, the Petition fails to show that the Ninth Circuit's decision conflicts with other decisions in the Ninth Circuit or with other courts of appeal and does not provide any other reason which would prompt this Court to exercise its discretion to grant the Petition.

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[6]Sussel has publicly announced that he is prepared to appeal the State Circuit Court decision, if necessary, to the State Supreme Court. He also claims that in the event of his demise before the matter is ultimately resolved, he has provided in his last will and testament for the continuation of the case after his death. *Honolulu Star-Bulletin*, Wednesday June 19, 1991, p. A-5. *See* Appendix D at p. 29a.

The District Court which originally dismissed Sussel's federal claims, recognized the inappropriateness of seeking a writ of certiorari in this matter. When a hearing on remand from the Ninth Circuit was held before Judge David A. Ezra in the District Court, the following exchange occurred between the Court and Sussel's counsel:

> THE COURT: Mr. King, with all due respect to your client's desire to see this go to the Supreme Court, my candid opinion is that you don't have a likelihood of success in getting the United States Supreme Court to grant certiorari on Mr. Sussel's claims. There is nothing novel, No. 1; nothing particularly imperative for the nation as a whole, No. 2. It's much a fact driven set of circumstances. That was made clear in my opinion; that was made clear in the Ninth Circuit's opinion. This is not the kind of case that the United States Supreme Court takes on certiorari on a regular basis. They turn down thousands of these every year.
>
> I understand that Mr. Sussel has become, if you will, engrossed in this litigation; such that he feels, I'm sure, that his claims are such that the United States Supreme Court must determine them. But they must not determine anything, they have the discretion to determine those cases that they wish to determine; and this just does not appear to be the kind of case which I see the United States Supreme Court granting certiorari on.
>
> MR. KING: I respect your opinion, Judge, but as an attorney for my client, I have an obligation.

See Excerpts from Partial Transcript of Proceedings, May 28, 1990, District Court. Appendix E at p. 31a.

Moreover, Sussel's Petition is premature in that he has triggered (1) the State's administrative process which has run its course and (2) an appeal of the administrative process to the State's judicial process which has not yet run its course.

Therefore, Sussel's Petition for Writ of Certiorari should be denied.

III.

ARGUMENT

REASONS FOR DENYING THE WRIT

This case does not involve a "politically-motivated demotion." Therefore, the Ninth Circuit was not "confused as to the proper causation standard to be applied in this case involving a politically-motivated demotion." (*See* Petition, Reasons for Granting the Writ I at p. 11.)

Once it was determined on the motions for summary judgment that there was no dispute as to any material facts and that summary judgment was appropriate on the First and Fourteenth Amendment claims and the § 1983 claims, then the heart of the case involved having to decide what was the proper forum for determining the threshold question of whether or not the personnel action was a downward reallocation or a demotion.

Neither the District Court nor the Ninth Circuit erred in this regard. The Ninth Circuit could not have put it more clearly when it stated at the outset of its Memorandum Opinion that "[t]o determine whether a genuine issue of fact is presented on the question of due process we first determine if there was a property interest and if so, what process was due before the government could deprive Sussel of that property interest. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982)." *See* Petitioner's Appendix A at p. 8a. The Ninth Circuit then properly concluded that the appropriate forum in which to resolve the threshold question was in the state. And until that resolution occurred, Sussel could not overcome the City's motions for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

Thus, Sussel's true complaint (although nowhere expressly articulated in his Petition) is that both the District Court and Ninth Circuit failed to meet the requirements of Rule 56 of the Federal Rules of Civil Procedure. The contention is groundless.

A. The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Sussel's Claim To A Right Of Political Belief And Association Under The First Amendment.

The District Court's grant of summary judgment dismissing Sussel's federal claims was reviewable *de novo* by the Ninth Circuit. *Ashton v. Cory*, 780 F.2d 816, 818 (9th Cir. 1986).

To avoid summary judgment on the political patronage ground of his § 1983 claim, Sussel had to prove that 1) patronage was a substantial motivating factor and 2) that there was an unconstitutional official policy involving political patronage. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977); *Celotex v. Catrett*, 477 U.S. 317 (1986).

Summary judgment in favor of the City was appropriate since there was an absence of any facts proving that the hiring of Kekuna or reassignment of Sussel's duties were accomplished pursuant to an unconstitutional official municipal policy or custom. ER 535 at 20, 21.

In order to avoid summary judgment, Sussel had to present evidence that political patronage was a "*substantial factor*" in the decision to remove his duties as the Civil Defense Administrator, and that political patronage was a substantial factor in the decision to hire Kekuna. *Mt. Healthy*, 429 U.S. at 287.

> Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a "substantial factor"---or, to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him.

Id. at 287 (footnote omitted).

If Sussel had discharged this burden, then the burden would have shifted to the City to show by a "preponderance of the evidence that it would have reached the *same* decision as to respondent's reemployment *even in the absence of the protected conduct.*" *Id.* at 287 (emphasis added).

Viewing the evidence in the light most favorable to Sussel, there was a complete absence of evidence to prove that political patronage was a motivating factor in the hiring of Kekuna or

the reassignment of new duties to Sussel. Since there was no proof of political patronage as the motivating factor, there obviously could be no proof of an official policy or custom of patronage.

Sussel accused the City's Civil Service Director of "doing what she's been instructed to do" but admitted that he did not "have any knowledge" of facts to support his charge. CR 391, Exhibit A at p. 142.

Sussel also testified that he believed that the City's Civil Service Director was motivated by "greed" in reallocating his position and not because of any alleged political activities by Kekuna or the fact that Sussel was a Democrat. CR 391, Exhibit A at pp. 16, 71. According to Sussel, the Civil Service Director "still retains her office, so obviously she contributed two thousand dollars to Fasi. Everyone in appointed positions were required to support him in one way or another, cook pancakes or do something. So I'm assuming. I have no facts to support that." CR 391, Exhibit A at pp. 138, 139.

Sussel's "political motivation" allegations were insufficient to state a claim upon which relief could be granted. He alleged no more than that "he was replaced by Defendants with a member of the republican party to which Defendant Fasi belonged, but to which Plaintiff did not belong." (Paragraph 60 of Sussel's Second Complaint. 2ER 1 at p. 21.) This was nothing more than a bald allegation based solely on the fact that Sussel did not belong to the same political party as Fasi (nor to any other political party), and nothing more. Moreover, Sussel was never "replaced."

It is Sussel's contention that the Ninth Circuit "did not expressly state that Petitioner had failed to allege facts to support a claim that the exercise of his First Amendment rights of political belief and association was a substantial or motivating factor for his demotion." Petition at p. 13. To the contrary, the Ninth Circuit expressly and properly found that Sussel failed "to establish a genuine issue of material fact" in that "[h]e has not alleged facts that support a claim that the exercise of his first amendment rights was a substantial or motivating factor for the actions taken towards him." *Citing Mt. Healthy*, 429 U.S. at 287. Petitioner's Appendix A at p. 9a. And in response to Sussel's allegation that he was "demoted," the Ninth Circuit

further found that Sussel "failed to present sufficient probative evidence that he was demoted because of his political affiliation. *See Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2735 (1990)." Petitioner's Appendix B at p. 14a.

The District Court viewed the foregoing evidence in the light most favorable to Sussel and found there was a complete absence of evidence to prove that political patronage was a motivating factor in the reassignment of new duties to Sussel. Obviously, on the same record, the Ninth Circuit, in its *de novo* review, was irrefragably driven to the same conclusion.

B. **The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Petitioner's Due Process Claims Under The Fourteenth Amendment.**

The Ninth Circuit properly affirmed the District Court's findings that there was no procedural or substantive due process violation, thus compelling a grant of summary judgment in favor of the City. *Celotex v. Catrett*, 477 U.S. 317 (1986). In its *de novo* review, the Ninth Circuit was compelled to affirm the District Court's decision.

The District Court found that Sussel was in the "civil service." This meant that Sussel would then be afforded the protection that civil service status gave him, including the right to appeal an adverse decision by the City's Civil Service Director to the City's Civil Service Commission and the right to a hearing under that process. (Rule 1.1-A.5.1 of the Revised Rules of the Civil Service Commission and Section 6-308 of the Revised Charter of the City and County of Honolulu 1973 (1984 Edition). Appendix F at p. 35a; Appendix A at p. 1a.)

The District Court correctly ruled that the City had a system, i.e., the Civil Service Commission, specifically designed to provide remedies to the Petitioner for alleged violations of his procedural due process rights. The District Court also noted that the City had not yet reached a final decision, that the process was still pending, and that the only conclusion reached thus far (i.e., the civil service issue) was in Petitioner's favor. The District Court refused to find that the City's system was "constitutionally defective" and that "as long as that system is

working and is not fundamentally deficient, [Petitioner] has not been deprived of the due process that system affords." ER 535 at p. 46.

The District Court ruled that the case should be litigated administratively or in the state courts and that basically the cause of action for due process was premature. Such administrative process or determination by the state courts had not yet occurred and therefore the cause of action based on due process claims had not yet accrued. In other words, there was no deprivation of due process at the time of the District Court's ruling and therefore it was not necessary to get to the § 1983 claims.

The District Court and the Ninth Circuit analyzed the question of whether or not the City Civil Service Commission would provide adequate due process to satisfy the constitutional guarantees therefor. Both courts recognized that the delays in the process at the state level were caused in part by both sides to the controversy, and that such delays had not reached such levels so as to have denied Sussel constitutionally adequate due process that the state system (i.e., City Civil Service Commission proceedings and judicial review thereof) was designed to provide.[7]

Both the District and Ninth Circuit courts implicitly agreed that the City Civil Service Commission would provide due process adequate to satisfy the constitutional guarantees thereof.

The Ninth Circuit correctly characterized the District Court's footnote to the effect that Sussel was "demoted" as *obiter dictum*. The finding of "demotion" was not necessary to the District Court's

---

[7]"[T]hat Civil Service Commission proceedings are sometimes slow to reach a result, does not necessarily constitute a violation of due process. *Cf.* [*Cleveland Board of Education v.*] *Loudermill*, 470 U.S. [532] at 547 [(1985)]. The delay in this case is the result of legitimate appeals by the parties." *See* Ninth Circuit Opinion, Petitioner's Appendix A at p. 9a.

"Further, as the procedural history indicates, plaintiff is responsible for at least a share of the delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term 'due process'. Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient." *See* District Court Decision, Petitioner's Appendix C at p. 43a.

determination of "civil service" status and far exceeded the scope of any of the requested relief sought by Petitioner in his motion for summary judgment which sought a determination of "civil service" status.

In oral arguments before the Ninth Circuit, the City offered, as it did in its written brief, that the District Court's footnote finding that Sussel was demoted, rather than downward reallocated, was *obiter dictum.* All of Sussel's claims, and each of his first five Questions Presented for Review and first five Reasons for Granting the Writ (which are the only ones relevant to the Petition), are dependent and premised on the erroneous assumption that he was demoted. The District Court's ultimate decision was not premised on a finding that Sussel was demoted, but only that his position was one in the City's Civil Service. Even absent such finding, the District Court's decision that the cause of action had not yet accrued would be upheld. Significantly, however, the Ninth Circuit did not accept the District Court's footnote finding that Sussel was demoted as evidenced by the following colloquy during oral arguments before it:

> MS. DEVENS [counsel for City]: And that's why I think that the court's demotion finding, a footnote for it is dictum.
>
> The court didn't give it a considered analysis. If you look at the rules that define what a demotion is and what downward rellaction [sic] is —
>
> JUDGE FARRIS: Well, we know what the court did. The court relied on the testimony of a one person who said he was demoted. That's all the court did.
>
> He didn't make a factual finding, he made a statement based on a statement made by a person who had, as Mr. King properly argued, stated that that's what happened. She was in a position to know so the judge took that as what happened. Isn't that pretty much what the record shows?
>
> MS. DEVENS: Yes.

Excerpts from Partial Transcript of Proceedings, April 9,

1990, Ninth Circuit. Appendix G at p. 36a.

In its Memorandum Decision that subsequently followed, the Ninth Circuit specifically found that,

> Sussel, however, was not terminated. He continues employment with the city and collects the same salary as he did before the acts complained of. The dispute is not whether demotion is an interest protec ed by the due process clause but whether Sussel was demoted or merely downwardly reallocated. The latter process is not protected by due process. State law determines the property interest in question but federal law determines whether or not the taking of such interest is a violation of due process. *See* Logan, 455 U.S. at 432.

Petitioner's Appendix A at p. 8a.

Certainly, Sussel should have thus been convinced that the Ninth Circuit made clear that it found no demotion, but only that there was a question of whether the personnel action taken was a downward reallocation or a demotion. Nevertheless, in his *third* Petition for Rehearing to the Ninth Circuit, Sussel persisted:

> The Opinion [Ninth Circuit Memorandum Opinion] still states (p. 4) that there is a dispute "whether Sussel was demoted or merely downwardly reallocated" and that the latter process is not protected by due process. However, this overlooks the District Court's express rejection of the downward reallocation defense and its legal conclusion that Sussel had been *demoted.* (Emphasis in original.)
>
> * * *
>
> The [Ninth Circuit] Court's misstatement of this finding on page 4 of its Opinion should be corrected.

Just as the Ninth Circuit ignored Sussel's pointing out its "error" in his first Petition for Rehearing of August 20, 1990 (pp. 13-14), and further ignored Sussel's request that the Ninth Circuit correct its "misstatement" in his second Petition for

Rehearing dated December 19, 1990, it also ignored Sussel's *third* request to correct its "misstatement" in his Petition for Rehearing filed February 20, 1991. Notwithstanding this repeated reaffirmation by the Ninth Circuit, Sussel still refuses to accept the fact that the Ninth Circuit meant what it said in its original Memorandum Decision and as subsequently amended, that "[t]he dispute is . . . whether Sussel was demoted or merely downwardly reallocated[,]" and that it is the "[s]tate law [that] determines the property interest in question . . . ." Petitioner's Appendix A at p. 8a.

Subsequent to the District Court's grant of the City's various motions for summary judgment and remand of the matter back to the State, Sussel availed himself of the administrative process accorded him under the State Administrative Procedure Act and the City Charter and Civil Service Rules to determine "the property interest in question," i.e., whether or not his civil service position was downward reallocated or whether he was removed from his position by way of a demotion. The administrative process initiated by Sussel, but delayed in large part due to various legal actions brought by him, was an adversarial process by way of a "contested case hearing" provided under the Hawaii Administrative Procedure Act. Haw. Rev. Stat. § 91-9. Appendix H at p. 39a. The issues involved in the administrative hearing were clearly defined, i.e., whether or not the personnel action in question was a "downward reallocation" or a "demotion" and, in whichever form, whether or not the action was "politically motivated." The administrative hearing afforded all parties the right to present evidence and argument on all the issues with the right of examination and cross examination of all witnesses. The administrative hearing was an extensive one, involving numerous witnesses and dozens of documents, most of which were offered by Sussel.

Sussel first appealed to the Civil Service Commission the Special Master's proposed finding that the personnel action taken was not politically motivated. Thereafter, Sussel appealed to the State Circuit Court, pursuant to the State Administrative Procedure Act, the Civil Service Commission's findings

that the personnel action taken was a downward reallocation and that it was not politically motivated. Haw. Rev. Stat. § 91-14 "Judicial Review of Contested Cases." Appendix H at p. 40a.

This latter pending appeal was filed as recently as July 10, 1991, and to which the City has filed a responsive pleading. Sussel has publicly announced that he will appeal to the State Supreme Court any adverse decision by the Circuit Court on his appeal of the Civil Service Commission's decision.

Thus far, Sussel has been accorded full due process in the administrative proceedings. Not being satisfied with the administrative conclusion resulting from the Civil Service Commission proceedings, Sussel has afforded himself a continuation of due process by the judicial appellate proceedings accorded him by state law. This is as it should be.

This Court should allow the State judicial process, triggered by Sussel's appeal of the Civil Service Commission's decision, to run its course in ultimately deciding whether or not the personnel action in question was a downward reallocation or a demotion. If it is the latter, then, as the Ninth Circuit properly and wisely held, "federal law determines whether or not the taking of such [property] interest is a violation of due process." *Citing Logan*, 455 U.S. at 432. Petitioner's Appendix A at p. 8a.

Therefore, the attempt to credit the Ninth Circuit with having created a difference between the *Mt. Healthy* "substantial or motivating factor" test in First Amendment free speech cases and the "solely because" test in the so-called First Amendment adverse employment cases, must fail. There was no such difference because the court never reached that point. Therefore, Sussel's Petition should be denied.

This Court should exercise its judicial discretion by denying Sussel's Petition for Writ of Certiorari since not until the State judicial process has run its course, will it be ripe to determine whether or not special and important reasons may or may not exist to support a petition for a writ of certiorari.

C. The Ninth Circuit Court Of Appeals Did Not Err In Affirming The District Court's Grant Of The City's Motion For Summary Judgment Dismissing Sussel's Civil Rights Claims Under 42 U.S.C. § 1983.

In order to avoid summary judgment on the issue of 42 U.S.C. § 1983 liability against the City, Sussel was required to make a showing sufficient to establish the existence of the elements essential to his case: 1) A violation of his constitutional rights, 2) that there was an official policy or custom to violate his constitutional rights, and 3) that the unconstitutional official policy or custom was the "moving force of the constitutional violation." *Monell v. New York City Department of Social Services*, 436 U.S. 658, 695 (1978). Sussel failed to meet any one of those requirements which compelled a grant of summary judgment in favor of the City. *Celotex v. Catrett*, 477 U.S. 317 (1986). Once the City discharged its burden of pointing to an absence of any facts to support Sussel's § 1983 claim, under *Catrett*, in order to avoid a grant of summary judgment, the burden of proving the affirmative was on Sussel. Sussel completely failed to do so.

The record established in the District Court was absolutely void of any support for Sussel's allegation that 1) his reassignment of new duties violated his constitutional rights and that 2) his reassignment of new duties was accomplished pursuant to an unconstitutional official municipal policy. Indeed, since the District Court specifically found that 1) there was no procedural due process violation, 2) there was no substantive due process violation, and 3) there was no equal protection violation, it did not have to address the issue of whether the alleged constitutional violations were the result of a city "policy or custom." Even if the District Court had found such a policy or custom, Sussel failed to establish that such policy was the "moving force" of any constitutional violation.

The District Court's grant of the City's motion for summary judgment on the "political motivation" allegations was also proper in that those allegations were insufficient to state a claim upon which any relief could be granted. As noted

hereinabove, bald allegations will not suffice. *See* Argument A at p. 11. *See Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274 (1977). "[C]onclusionary allegations, unsupported by facts, [will be] rejected as insufficient to state a claim under the Civil Rights Act." *Sherman v. Yakahi*, 549 F.2d 1287 (9th Cir. 1977).

Sussel was required to have alleged material facts, as a minimum, that because he was not a Republican, that was a "substantial factor" in the City's decision to "reassign" duties to Sussel's "position" and to "downward reallocate" the same. Nothing in Sussel's two complaints allege any facts, much less material facts, that Sussel's political affiliation was a "substantial factor," or a factor at all in the defendants' actions.

The District Court viewed the evidence in the light most favorable to Sussel and found there was a complete absence of evidence to prove that political patronage was a motivating factor in the hiring of Kekuna or the reassignment of new duties to Sussel. Obviously, the Ninth Circuit Court arrived at the same conclusion.

The Ninth Circuit, in affirming the District Court, properly found that Sussel "has failed to present sufficient probative evidence that he was demoted because of his political affiliation." *Citing Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729, 2735 (1990). Petitioner's Appendix A at p. 14a. Hence, there was no error by the Ninth Circuit.

IV.

CONCLUSION

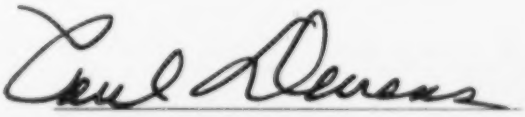
Sussel's Petition for Writ of Certiorari fails to present any special and important reasons for granting the petition; nor does it show that the Ninth Circuit's decision which affirmed the District Court's summary judgment disposition of all of Sussel's federal claims, conflicts with other decisions in the Ninth Circuit or other courts of appeal; nor does it provide any other reason which would prompt this Court to exercise its discretion to grant the petition.

Moreover, Sussel's Petition for Writ of Certiorari is premature since the State judicial process triggered by Sussel's appeal of the Civil Service Commission's Decision has yet to run its course, which it should be allowed to do.

Therefore, the City respectfully requests this Court to deny Sussel's Petition for Writ of Certiorari.

DATED: Honolulu, Hawaii, September 10, 1991.

Respectfully submitted,



PAUL DEVENS
Counsel of Record
1600 Central Pacific Plaza
220 South King Street
Honolulu, Hawaii 96813
Tel. No. (808) 521-1456

Attorney for Respondent
City and County of Honolulu

APPENDICES

APPENDIX A

Revised Charter of the City & County of Honolulu 1973 (1984 Ed.)

Section 6-102. Powers, Duties and Functions — The managing director shall:

(a) Supervise the heads of all executive departments and agencies assigned to the managing director by section 4-102 of this charter.

* * *

Section 6-308. Appeals —

1. Any person aggrieved by any action of the director of civil service or who has been suspended, demoted or dismissed may appeal to the civil service commission for redress, pursuant to its rules and regulations.

2. If the civil service commission, after a hearing, orders a demoted, dismissed or suspended employee reinstated, it may reinstate such employee under such conditions as it deems proper.

APPENDIX B

CHARLES K.Y. KHIM #2731
Attorney at law
City Financial Tower, Suite 1620
201 Merchant Street
Honolulu, Hawaii 96813
Telephone: (808) 537-5305

Attorney for Plaintiff Malcolm A. Sussel

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

MALCOLM A. SUSSEL, *Plaintiff* vs. CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu;	) CIVIL NO. 88-1285-04) (Declaratory Judgment))) AFFIDAVIT OF) CHARLES K.Y. KHIM;))))))))) TIME: 9:00 a.m.)) DATE: August 20, 1991)) JUDGE: The Honorable) Robert G. Klein))))	

JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu; and JOHN AND MARY DOES 1-10,

Defendants.

AFFIDAVIT OF CHARLES K. Y. KHIM

Charles K. Y. Khim, being first duly sworn upon oath, deposes and says that:

1. He makes this affidavit upon personal knowledge unless otherwise stated;

2. He is the attorney for Malcolm A. Sussel in the above captioned matter. In addition, Dennis W. King, Esq., who upon information and belief, is an attorney licensed to practice law in the State of Hawaii is also an attorney for the Plaintiff Malcolm A. Sussel in the above captioned matter;

3. The Affiant is also an attorney who has been retained by the Hawaii Government Employees' Association, AFSCME Local 152, AFL-CIO, hereinafter referred to as HGEA/AFSCME on a continual basis to represent the HGEA/AFSCME in numerous matters. The Affiant's representation of the HGEA/AFSCME referred to above antecedes the representation of the Plaintiff Sussel in the above captioned matter;

4. On or about November 19, 1990 the Plaintiff Sussel filed with the Hawaii Labor Relations Board, hereinafter referred to as HLRB an unfair labor practice complaint against

the HGEA/AFSCME. On or about November 20, 1991 the Plaintiff herein Malcolm A. Sussel filed with the HLRB a prohibited practice complaint against the HGEA/AFSCME;

5. The Affiant filed on behalf of the HGEA/AFSCME answers to both the aforesaid prohibited practice complaint and the aforesaid unfair labor practice complaint;

6. Due to the fact that attorney King also represents the Plaintiff Sussel in the above captioned matter and prepared pleadings in Plaintiff Sussel's cases before the Circuit Court including the instant matter, pleadings without prior consultation with or prior knowledge of, the Affiant, and that attorney King had made an appearance on behalf of Plaintiff Sussel in the HLRB's proceedings over the aforesaid prohibited practice complaint and the aforesaid unfair labor practice complaint, it appears that attorney King has actively taken over all of Plaintiff Sussel's aforesaid litigation including, but not limited to, the above captioned matter;

7. Upon information and belief, but without personal knowledge, attorney King, Plaintiff Sussel, or both stated to the Civil Service Commission of the City and County of Honolulu, hereinafter referred to as Civil Service Commission, on or about May 21, 1991, that the Affiant still actively represents Plaintiff Sussel in the above captioned matter;

8. In response to the foregoing statements of attorney King, Plaintiff Sussel, or both, on or about June 21, 1991 the Affiant sent both Plaintiff Sussel and attorney King a letter stating that there is potentially a conflict of interest between the Affiant's representation of both the HGEA/AFSCME in the proceedings being conducted by the HLRB over the unfair labor practice complaint referred to above and the prohibited practice complaint referred to above, and the representation of Plaintiff Sussel in the above captioned matter;

9. The Affiant in his aforesaid June 21, 1991 letter requested that Plaintiff Sussel, after being fully informed of the potential conflict of interest referred to above, inform the Affiant as to whether or not he wishes to waive the aforesaid potential conflict of interest referred to above pursuant to the dictates of DR 5-1-5(C) of the Code of Professional Responsibility which provides that "a lawyer may represent multiple clients if it is obvious that he can adequately represent the

interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent professional judgment on behalf of each";

10. Late in the afternoon of Friday, July 26, 1991 the Affiant received a letter from attorney King who spoke on behalf of both himself and Plaintiff Sussel. This letter informed the Affiant that the aforesaid potential conflict of interest was not waived by Plaintiff Sussel pursuant to DR 5-105(C);

11. DR 5-105(B) states that "a lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, except to the extent permitted under DR 5-105(C)";

12. By reason of the foregoing, it is the position of the Affiant that under DR 2-110 of the Code of Professional Responsibility and by reason of the premises the Affiant submits that he must withdraw as counsel for Plaintiff Sussel, that Plaintiff Sussel will not be prejudiced by this withdrawal of counsel since he is already represented in the above captioned matter by attorney King; and

13. The Affiant has verified that the address and telephone number of the Plaintiff Sussel are: 59-497 Makana Road, Haleiewa, Hawaii, 96712; telephone: (808) 638-7567, and the Affiant has advised Plaintiff Sussel that he is obligated to inform the clerk of court of any changes of his mailing and residence address, and telephone number.

FURTHER AFFIANT SAYETH NAUGHT.

/s/CHARLES K. Y. KHIM
CHARLES K.Y. KHIM

Subscribed and sworn to before me this
29th day of July, 1991.

/s/Sue A. Kaneshiro
NOTARY PUBLIC - STATE OF HAWAII
My Commission Expires: 12/17/94

APPENDIX C

BEFORE THE CIVIL SERVICE COMMISSION
CITY AND COUNTY OF HONOLULU
STATE OF HAWAII

In the Matter of the Appeal of	)	
	)	
MALCOLM A. SUSSEL,	)	FINAL DECISION
	)	AND ORDER
Appellant.	)	
	)	

FINAL DECISION AND ORDER

INTRODUCTION

This appeal came on for hearing before the City and County of Honolulu Civil Service Commission (hereinafter "Commission"). Dennis W. King, Esq., represented Malcolm A. Sussel (hereinafter "Appellant"). Paul Devens, Esq., represented the City and County of Honolulu (hereinafter "Employer"). Steven M. Nakashima, Esq., represented the Mayor Frank F. Fasi, as a party-intervenor (hereinafter "Mayor").

The issue in this appeal centers around whether the personnel action taken by the Employer against Appellant violated any Civil Service law, rule or regulation. Specifically, the issue is whether Appellant was illegally stripped of all powers and authorities as the Oahu Civil Defense Administrator and was involuntarily demoted, without proper cause and in violation of applicable civil defense and civil service laws, rules, regulations and policies. *See* Appellant's Petition of Appeal dated January 25, 1985.

The Commission concludes that Appellant was not illegally stripped of his powers and authorities as the Oahu Civil Defense Administrator and was not demoted. Instead, Appellant's position was properly reallocated downward in accordance with applicable Civil Service laws, rules and regulations.

Accordingly, the instant appeal is denied.

PROCEDURAL RECORD

This Commission originally entered its Findings of Fact, Conclusions of Law, Decision and Order in this matter on January 7, 1986. The Commission's Decision and Order found that Appellant had no civil service status, that the reassignment of Appellant's duties was not subject to review by the Commission, and that Appellant was not demoted.

This Decision and Order by the Commission was then appealed by Appellant to the First Circuit Court of the State of Hawaii. In a decision dated May 22, 1987, Judge Edwin H. Honda found that Appellant was a civil service employee. Accordingly, the Court vacated the Commission's Decision and Order, and remanded the case back to the Commission for further proceedings consistent with the Court's ruling.

On remand, the Commission decided to conduct these proceedings *de novo.*

Pursuant to section 76-47, Hawaii Revised Statutes, and Civil Service Rule 5.4f, the Commission appointed Walter H. Ikeda as a Special Master to hear evidence in this case. *See* letter dated June 1, 1990, from Acting Chair Beverly Nagy.

Hearings were held over 11 separate days, from December 10, 1990 to January 15, 1991. During these hearings, evidence was submitted to and received by Special Master Ikeda.

On April 24, 1991, Special Master Ikeda issued his proposed Findings of Fact; Conclusions of Law; Decision and Order (hereinafter "Proposed Decision and Order").

All parties hereto had the opportunity to file exceptions to the Proposed Decision and Order, and the opportunity to present oral arguments to the Commission, in accordance with section 91-11, Hawaii Revised Statutes. Oral arguments were heard by the Commission on May 21, 1991 and on June 18, 1991.

The Commission, having duly considered the testimony and exhibits presented at the hearing and having heard the arguments of all parties and having been advised of the issues, hereby makes the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

The Employer, in a document entitled "Appellees' Exceptions To The Proposed Findings Of Fact; Conclusions Of Law; Decision And Order By The Special Master Dated April 24, 1991," submitted and proposed its own Findings of Fact and Conclusions of Law. These proposals were contained in Exhibit A, which was attached to the aforementioned document. They were received by the Commission on or about May 13, 1991. The Commission hereby adopts and accepts the following proposed Findings of Fact and Conclusions of Law, as its own:

Employer's Findings of Fact Nos. 1 - 16, 18, and 22 - 64. Any reference therein to "Special Master" shall be changed to "Commission."

Employer's Conclusions of Law Nos. 1 - 16. Any reference therein to "Special Master" shall be changed to "Commission."

Employer's Findings of Fact Nos. 17 and 19 - 21 refer to Appellant's competency, which the parties agreed was not an issue. Accordingly, the Employer's Findings of Fact Nos. 17 and 19 - 21 are rejected.

In addition to the foregoing, the Commission makes the following Findings of Fact:

1. Effective June 2, 1982, Appellant was appointed to the position of Executive Assistant I (Civil Defense Administrator), EM-07, (Position No. CD 300) by then Mayor Eileen Anderson.

2. This position has been deemed by the Court to be a civil service position, and accordingly, Appellant is to be considered a civil service employee. *See* Judge Edwin H. Honda's Decision and Order file-dated May 22, 1987 in *Sussel vs. Civil Service Commission of the City and County of Honolulu, et al.*; First Circuit Court of the State of Hawaii; Civil No. 86-328.

3. On or around January 18, 1985, Appellant's duties and responsibilities as Executive Assistant I (Civil Defense Administrator), EM-07, (Position No. CD 300), were reassigned and changed by the Employer. Appellant still retained certain staff responsibilities but was divested of any supervisory authority. *See* Special Master Ikeda's proposed Finding of Fact No. 28.

4. Pursuant to this reassignment and change of duties and responsibilities, Appellant's position was moved "to another class," i.e., Administrative Assistant II, SR-21, (Position No. CD 300). Appellant was not moved "to another position." Appellant

continued to occupy Position No. CD 300. *See* Employer's proposed Finding of Fact No. 57 and No. 62.

5. In addition, when Appellant was moved "to another class," his salary at his former classification was preserved. This was accomplished through a process using temporary differential pay, or what is commonly referred to as "red circling." *See* Employer's Finding on Fact No. 52. The Commission is not aware of any instance wherein a civil service employee upon being demoted, had his salary "red circled." This adds further support to the conclusion that Appellant was reallocated and not demoted.

6. Civil Service Rule 1.1-C.33 defines a "Reallocation Downward" as follows:

> The reallocation [i.e., *the movement of a position from one class to another class*] of a position:
>
> (1) to a class assigned to a lower pay range in the same compensation schedule, or
>
> (2) to a class in another compensation schedule with a lower maximum rate of compensation and the dollar difference between the two maximum rates is more than the dollar difference between the minimum and second steps of the former pay range; provided that a rate of five percent more than the minimum rate of the range shall be deemed to be equivalent to the second step in the EM schedule.
>
> (Note: Material in brackets is the definition of "reallocation" as defined in Civil Service Rule 1.1-C.32.)

(Emphasis added).

7. Civil Service Rule 1.1-C.10 defines a "Demotion" as follows:

> The movement of a regular employee from the position in which such employee last held permanent appointment *to another position*:
>
> (1) which is assigned to a class with a lower pay range in the same compensation schedule, or
>
> (2) which is assigned to a class with a lower maximum rate of compensation in another compensation schedule and the dollar difference between the two maximum rates is more than the dollar difference between the minimum

and second steps of the former pay range; provided that a rate of five percent more than the minimum rate of the range shall be deemed to be equivalent to the second step in the EM schedule.
(Emphasis added).

8. Any Finding of Fact stated herein which should more properly be construed as a Conclusion of Law shall be deemed to be such.

9. Any of the following Conclusions of Law which should more properly be construed as a Finding of Fact shall be deemed to be such.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, and in addition to the Employer's Conclusions of Law Nos. 1 - 16, which were adopted and accepted earlier in this Decision, the Commission makes the following Conclusions of Law.

1. The Civil Service Rules have been formally promulgated through the Hawaii Administrative Procedure Act (chapter 91, Hawaii Revised Statutes) and therefore, they have the force and effect of law.

2. Under Civil Service law, the Employer has the right to reassign and change the duties and responsibilities of a civil service employee.

3. Pursuant to Civil Service Rule 1.1-C.33, Appellant's position was reallocated downward. Appellant was not demoted. Therefore, Appellant's allegations with respect to being involuntarily demoted, without proper cause and in violation of law, are without merit.

4. Appellant's downward reallocation was justified. It was neither arbitrary or capricious, nor motivated by political considerations. Appellant, through his legal counsel, Charles K.Y. Khim, and his Hawaii Government Employees Association ("HGEA") union representative, Keith Ahue, expressed the concern to the Employer that Appellant had been stripped of his duties and responsibilities, yet Appellant was still left with possible liability in the event a claim was brought against the

Oahu Civil Defense Agency. *See* Employer's Finding of Fact No. 30. Therefore, the downward reallocation by the Employer was a reasonable means of addressing Appellant's concern.

5. The downward reallocation of Appellant's position was done properly. The concern raised with respect to noncompliance with the policies and procedures of the Budget Department is without merit.

6. First of all, the policies and procedures of the Budget Department are beyond the scope of this appeal. They do not involve an alleged violation of any Civil Service law, rule or regulation. Therefore, any violation or noncompliance with the policies and procedures of the Budget Department cannot be resolved by appealing to this Commission.

7. Secondly, assuming *arguendo*, that this Commission does have jurisdiction to resolve the matter of the alleged violation and noncompliance with the policies and procedures of the Budget Department, these policies and procedures are not rules under the Hawaii Administrative Procedure Act (chapter 91, Hawaii Revised Statutes). Therefore, these policies and procedures do not have the force and effect of law. They are just guidelines for the County departments to follow during a reallocation action. They merely assist in the internal processing of the reallocation action. Accordingly, a violation of these policies and procedures would not necessarily constitute a violation of law.

8. Thirdly, the policies and procedures of the Budget Department expressly state that "all *or only some of the steps may be utilized*, or several may be taken simultaneously" "depending upon the nature and complexity of the proposed course of action." (Emphasis added.) (Guidelines for Coordination in the Planning and Processing of Personnel Requests). In light of the foregoing provision, the Employer's downward reallocation of Appellant's position was not in violation of these policies and procedures.

9. Fourthly, the Budget Department's policies and procedures require that the reallocation be requested on a prescribed form showing a change in the positions being supervised, the impact of the organizational placement and an analysis to show why the duties merited the change. *See*

Special Master Ikeda's proposed Finding of Fact No. 36. The appropriate remedy to correct these procedural problems would be to order the Employer to comply with these requirements. Appellant's downward reallocation would not be negated or rendered void.

10. Finally, if there were any "injury" to Appellant in the nature of the lack of notice or the lack of opportunity to be heard, due to a violation or noncompliance with the Budget Department's policies and procedures, this injury has been cured by Appellant's appeal to this Commission. In appealing his "downward reallocation" to this Commission, Appellant was provided with a hearing on this matter as well as the opportunity to present evidence and cross-examine witnesses. After listening to all of the evidence and arguments, the Commission is satisfied that the existent circumstances justified the change in Appellant's duties by the Employer.

11. The process by which Mr. Kekuna was appointed into the position of Deputy Director Designate for the Oahu Civil Defense Agency was not politically motivated and was therefore, not violative of section 76-1(1), Hawaii Revised Statutes. *See* Special Master Ikeda's proposed Conclusion of Law No. 8.

12. The reallocation downward of Appellant's position was also not politically motivated and was therefore, not violative of section 76-1(1) or section 76-44, Hawaii Revised Statutes. Appellant has not met his burden of proof in showing that the reallocation downward of his position was politically motivated by either the Employer or the Mayor. In fact, Special Master Ikeda specifically concluded that Appellant was not reallocated downward due to political considerations. *See* Special Master Ikeda's proposed Conclusion of Law No. 8.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the appeal filed herein is hereby DENIED.

All findings of fact proposed by the parties or by Special Master Ikeda, which are inconsistent herewith or which are not expressly addressed in this Final Decision and Order, are

hereby rejected in accordance with section 91-12, Hawaii Revised Statutes.

DATED: Honolulu, Hawaii, June 26, 1991

CIVIL SERVICE
COMMISSION
CITY AND COUNTY
OF HONOLULU

/s/ Beverly Nagy
BEVERLY NAGY
Acting Chairman

/s/ Ginine Castillo
COMMISSIONER

/s/ Michael A. McGuire
COMMISSIONER

/s/ Charles Izumoto
COMMISSIONER

/s/ Neil P. Silva
COMMISSIONER

APPROVED AS TO FORM:

/s/ Francis Paul Keeno
FRANCIS PAUL KEENO
Deputy Attorney General

Attorney for the Commission

Of Counsel:
IKAZAKI, DEVENS, LO,
YOUTH & NAKANO

PAUL DEVENS 536-0
CARON M. INAGAKI 3835-0
1600 Central Pacific Plaza
220 South King Street
Honolulu, Hawaii 96813
Tel. No. (808) 521-1456

Attorneys for APPELLEES
except MAYOR FRANK F. FASI

CIVIL SERVICE COMMISSION
CITY AND COUNTY OF HONOLULU

In the Matter of the Appeal of	) APPELLEES' PROPOSED
	) FINDINGS OF FACT AND
Malcolm A. Sussel	) CONCLUSIONS OF LAW;
	) CERTIFICATE OF
Appellant,	) SERVICE
	)
and	)
	)
The City and County of	)
Honolulu; Mayor Frank F.	) HEARING DATE:
Fasi; Managing Director D.G.	) December 10, 1990
"Andy" Anderson; Mr. George	)
Kekuna, Managing Director's	) SPECIAL MASTER:
Office; Ms. Loretta Fukuda,	) Honorable Walter Ikeda
Director of Civil Service,	)
	)
Appellees.	)

APPELLEES' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to Rule 1.1-A.5.4-p of the Revised Rules of the Civil Service Commission, Appellees, the City & County of

Honolulu, D.G. "Andy" Anderson, George Kekuna and Loretta Fukuda, by and through their attorneys, IKAZAKI, DEVENS, LO, YOUTH & NAKANO, hereby submit the following proposed Findings of Fact and Conclusions of Law.

The above-entitled appeal came on for hearing before the Special Master, Mr. Walter Ikeda, duly appointed by the Civil Service Commission, commencing on December 10, 1990, and continuing through January 15, 1991, over the course of eleven separate days.

Appellant Malcolm A. Sussel was represented by his counsel, Dennis W. King. Appellee Frank F. Fasi was represented by his counsel, Steven M. Nakashima. All other Appellees were represented by Paul Devens and Caron M. Inagaki.

After hearing the testimony presented at the hearing and reviewing the closing memoranda and exhibits offered by the parties, and the case having been submitted for decision, the Special Master, being fully advised of the facts and circumstances of this matter, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

On the issues raised in the hearing on Malcolm A. Sussel's appeal, the Special Master hereby finds the following facts:

1. Frank F. Fasi ("the Mayor") was elected as a Republican to the office of Mayor of the City and County of Honolulu in 1984. Reporter's Transcript ("RT") 12/10/90 at 34:24-35:3.

2. Prior to taking office, the Mayor sought to fill certain positions in the City government through a Blue Ribbon Committee, which was made up of citizens from a cross section of the community who worked as volunteers and received no compensation. RT 12/13/90 at 14:13-15:4, 152:16-153:23.

3. The purpose of the Blue Ribbon Committee was to seek applications for the various city government positions and to recommend one or two persons to the Mayor. The Mayor and members who served on the committee all testified that the committee's only criteria was to find the best qualified applicants for each position and that the applicant's political affiliations

was not a consideration in making their recommendations. There has been no evidence to the contrary. RT 12/13/90 at 20:10-13, 20:23-21:11, 255:23-257:25; RT 12/17/90 at 214:12-14, 219:16-220:4, 220:7-9; RT 12/19/90 at 136:15-20, 177:14-19, RT 12/21/90 at 175:10-16.

4. Of the six applicants for office of civil defense, one of the two recommended by the Blue Ribbon Committee for the head of City civil defense was George L. Kekuna ("Kekuna"). Exhibit ("Ex.") 129. RT 12/19/90 at 168:18-169:3, 170:16-21; RT 12/21/90 at 195:7-11.

5. Kekuna was at that time employed as a planner with the State Office of Civil Defense. RT 12/20/90 a.m. at 46:9-17.

6. Upon inquiry by the Mayor, General Alexis Lum, the State Director of Civil Defense and Kekuna's former employer, gave a favorable assessment of Kekuna's abilities to the Mayor based on Kekuna's job performance with State civil defense. RT 12/18/90 at 43:1-7, 62:20-63:22.

7. Although traditionally the practice was to appoint the Mayor of each county as the State Deputy Director of Civil Defense for that county, General Lum suggested to the Mayor that because of past difficulties with having the Mayor assume the two roles of Mayor and State Deputy Director of Civil Defense, perhaps someone other than the Mayor should be appointed State Deputy Director for the County of Honolulu. Ex. 16.

8. The Mayor agreed with General Lum and recommended Kekuna. He then asked General Lum to appoint Kekuna as Deputy Director. Ex. 18, Ex. 19.

9. General Lum, by letter dated January 2, 1985, tendered the appointment of Deputy Director of Civil Defense to Kekuna. Ex. B.

10. Subsequently, General Lum appointed the Mayor as Deputy Director of Civil Defense in a letter dated January 9, 1985, because he realized that the Mayor was in a better position to commit the necessary resources in case of an emergency. It was not a reflection on Kekuna's abilities. Ex. 23; RT 12/18/90 at 44:19-45:18.

11. When the Mayor assumed office on January 2, 1985, Kekuna was appointed to Position No. MD 134, Executive Assistant II, in the Managing Director's Office. Ex. 32.

12. The Mayor intended Kekuna to, amongst other duties assigned by the Managing Director, exercise supervision over the City's civil defense agency. RT 12/13/90 at 64:2-15.

13. In keeping with his belief that the City would be best served by having a "designate" take the Mayor's place as the traditional appointee to serve as State Deputy Director, the Mayor appointed Kekuna as "Deputy Director-Designate" to oversee the City's civil defense agency. Ex. 61; RT 12/13/90 at 64:6-15, 100:20-24, 101:21-102:5, 104:21-24. Kekuna was intended to be in a position between the Mayor and the City's civil defense agency and to be overseer in charge of the agency. RT 12/14/90 at 9:22-10:3.

14. Appellant Malcolm A. Sussel ("Sussel") had first learned that the Mayor had announced his intention to appoint Kekuna to head the City's civil defense agency on or about December 13, 1984. RT 12/20/91 p.m. at 93:21-94:9, 97:15-21.

15. That evening, Sussel composed a letter to the Mayor and had it hand-delivered to the Mayor at his campaign headquarters the next day. The letter was dated that day, December 14, 1984. Ex. 17. RT 12/20/90 p.m. at 97:15-21.

16. Sussel assumed that he was being removed or terminated from the position he then occupied in the City's civil defense agency, Executive Assistant I, Position No. CD 300 and believed, as he wrote in his letter, that it was a result of "information from various sources external to your team which could have been derogatory toward me." Thus, Sussel requested a meeting with the Mayor "to refute any allegations made against me and show you why I am the person you want and need for the job." Ex. 17.

17. The Special Master finds no evidence of any "external" sources providing "derogatory" information about Sussel to the Mayor. Accordingly, the Special Master finds that this was not a consideration by the Mayor when he appointed Kekuna to head the City's civil defense agency.

18. The Mayor agreed to meet with Sussel on the very next day, December 15, 1985, at the Mayor's Campaign Headquarters. D.G. "Andy" Anderson ("Anderson" or "Managing Director") was also present at the meeting. RT 12/20/90 p.m. at 98:1-9.

19. It was at this meeting that the Mayor learned of difficulties and/or disagreements between Sussel and General Lum. At the meeting, Sussel criticized General Lum and stated that the General was not acting in the best interests of the City and County. Ex. 29. RT 12/20/90 p.m. at 101:20-24. There is also evidence that Sussel had serious difficulties with members of General Lum's staff. RT 12/18/90 at 57:19-58, Ex. C.

20. Through Sussel's statements regarding General Lum, the Mayor also formed the opinion that Sussel was insubordinate to General Lum and felt that "insubordination against a commanding general could not exist" and felt that the City needed "a civil defense administrator who is going to cooperate with and have confidence in the fellow who heads the whole civil defense operation." RT 12/13/90 at 39:6-15.

21. Matters involving Sussel's competence are not to be considered for purposes of this hearing; however, the Special Master finds that the Mayor's opinion as to Sussel's insubordination toward General Lum is relevant for purposes of showing the reasons for the Mayor's belief that he needed someone above Sussel to communicate directly with State Civil Defense.

22. The Special Master also finds that the Mayor had a sincere concern about maintaining smooth and effective relations between the City's civil defense agency and the State Office of Civil Defense because of his responsibility for the health, safety and welfare of the residents of Honolulu in matters of natural disasters. RT 12/13/90 at 116:3-117:5.

23. Further indication that Sussel assumed that Kekuna's appointment meant that he was to be terminated from his position, was his letter of December 21, 1984, wherein he instructed his lawyer to ask the Mayor not to terminate him. Ex. 20. RT 12/20/90 at 105:7-14.

24. On January 2, 1985, Sussel met with Anderson and one of Anderson's staff members, Pat Ayers. Sussel tape recorded their conversation without Anderson or Pat Ayer's knowledge, then had the tape transcribed. RT 12/20/90 at 121:16-122:20. Ex. 47A.

25. In their conversation, Anderson stated specifically that Kekuna was to assume the role and responsibility of the Mayor as Deputy Director of Civil Defense and would be directly responsible for the City's civil defense agency. Anderson also assured Sussel that Sussel was not being fired or removed and would remain in his position. However, Sussel would be subject to Kekuna's authority, just as he would be subject to the Mayor's authority. Anderson further assured Sussel that he would retain his salary. Ex. 47A.

26. There has been no dispute as to the accuracy of the transcription and Anderson was unaware that the conversation was being recorded. For these reasons, the Special Master finds these statements by Anderson to be especially credible and persuasive. The Special Master consequently also finds that Sussel was mistaken in his assumption that he was to be terminated from his position.

27. On January 7, 1985, Anderson and Kekuna appeared at the City's civil defense agency office and met with the employees thereof, including Sussel. RT 12/21/90 at 103:16-22.

28. The contents of a memorandum of that date from the Managing Director were made known to all those present. The memorandum provided that:

> The Mayor has temporarily named Mr. George Kekuna, one of his assistants, to assist the Managing Director to ensure the competent and efficient organization and operation of the City and County's Honolulu Civil Defense Agency.
>
> All employees will look for direction and guidance of this City agency from Mr. Kekuna at all times. Ex. 14.

29. Following the January 7, 1985, visit, Sussel had his attorney call a meeting with the Managing Director which was held on January 9, 1985, in the Managing Diretor's office. In attendance were the Managing Director, the Corporation Counsel,

the Civil Service Director. Also present were Sussel, his attorney, Mr. Charles Khim, and a Hawaii Government Employees Association ("HGEA") union representative, Mr. Keith Ahue. RT 1/3/91 at 98:15-23.

30. At the January 9, 1985, Sussel's representative expressed a concern that Sussel had been stripped of his duties and responsibilities, yet still was left with possible liability in the event any claims were brought against the Civil Defense Agency. Ex. 51.

31. This concern about possible liability was expressed by Sussel to his representatives before the January 9, 1985, meeting, at the time of the meeting, and after the meeting in a letter he sent to the Managing Director dated the following day, January 10, 1985. RT 12/14/90 at 166:24-168:10, Ex. 51, Ex. 24.

32. Sussel made much of his attorney having authored the letter and then presenting it to Sussel as a "fait accompli" with instruction to sign it. Nonetheless, the Special Master finds that Sussel signed the letter as his own, as he admitted at the hearing. Sussel did not point out anything of substance in the letter that he disagreed with. RT 1/15/91 at 158:4-160:10, 163:9-10.

33. Sussel also made a memorandum of the January 9, 1985, meeting, and it, too, made mention of the liability concern expressed at the meeting. Ex. 51.

34. The Corporation Counsel and the Civil Service Director readily recalled the concern about Sussel's personal liability being the central theme of the January 9, 1985, meeting. RT 12/18/90 at 221:20-222:12, 223:7-13, WDT 11/17/87 at 66:21-67:9.

35. Anderson also recalled that Sussel expressed concern that he, Sussel, might be held liable for actions taken in his job where he no longer had the same responsibilities. RT 12/13/90 at 185:3-186:1.

36. Mr. Ahue recalls that the issue regarding Sussel's liability was raised at the January 9, 1985, meeting and that even prior to the meeting, Sussel had expressed this concern that although his duties had been removed, he would still be liable for the actions of the agency. RT 12/14/90 at 166:24-168:10.

37. The only other party who attended the meeting was Sussel's attorney, but the Special Master notes that Sussel did not call his attorney to testify regarding the January 9, 1985, meeting and the issue of liability.

38. Sussel denied expressing fear of liability at the January 9, 1985, meeting and claimed that he never had any concern about liability. He, in fact, claimed that he *sought* responsibility and liability. RT 1/3/91 at 99:15-17; RT 1/15/91 at 95:4-14. In light of the contrary testimony of other persons at the meeting, including Sussel's own union representative, the Special Master finds that this expression is not credible.

39. After the January 9, 1985, meeting, the Managing Director, the Civil Service Director and the Corporation Counsel had discussions on how best to resolve the problems raised at the meeting. RT 12/18/90 at 225:17-226:11.

40. Both the Corporation Counsel and the Civil Service Director agreed that the only way to give Sussel the assurance that he would be free of the type of liability he had expressed concern about at the meeting was to change his job duties and responsibilities. RT 12/18/90 at 22:8-11.

41. The Corporation Counsel, Mr. Richard Wurdeman ("Wurdeman"), was an experienced city government attorney, having some ten years of combined service in both the Prosecuting Attorney's office, the Department of the Corporation Counsel and the City Council's staff. He served briefly as the Corporation Counsel in 1980. Wurdeman Deposition Transcript ("WDT") 11/17/87 at 7:7-8:19.

42. The Civil Service Director for the City and County of Honolulu, Mrs. Loretta K. Fukuda ("Fukuda"), had some 35 years of experience in public personnel administration with the State of Hawaii. RT 12/14/90 at 71:12-72:4.

43. In an attempt to resolve the dilemma of having Kekuna exercise supervision over the City's civil defense agency out of the Managing Director's office on the one hand, and satisfying Sussel's liability concern and avoiding litigation on the other, the Department of Civil Service began the process of reallocating Sussel's position downward whereby his duties

were described in a manner that would resolve his concern about liability as expressed by his representatives at the January 9, 1985, meeting. RT 12/18/90 at 153:10-22.

44. Meanwhile, after the January 9th meeting, but prior to January 21, 1985, Sussel was in and out of the City's civil defense agency office on vacation leave, or if he was in the office, he was busy moving his belongings from his former office to another adjacent private office at the agency. RT 1/3/91 at 49:11-25, 58:10-21.

45. On or about January 11, 1985, Sussel was asked to deliver the keys to the front door and executive toilet to Kekuna. He was also asked to turn in his pager and he was no longer required to respond to night emergencies. In addition, Sussel was informed that he would no longer act as the agency's spokesperson with the media. Ex. 31, RT 1/3/91 at 59:10-60:9.

46. Sussel's reallocation was effectuated on or about January 18, 1985. Ex. 33B, Ex. 34, Ex. 45. Sussel learned of his reallocation on January 21, 1985 when he returned to work from vacation leave. At that time, he received a copy of his new position description and his downward reallocation. RT 1/3/91 at 51:5-15.

47. Sussel then took leave commencing the afternoon of January 21, 1985, and did not return to work until almost one year later on January 2, 1986. RT 1/3/91 at 51:9-10, 61:17-62:9, 62:13-18, 63:2-11.

48. Kekuna had intended to utilize Sussel as Kekuna's "second in command," but because of Sussel's general unavailability and sporadic appearances at the office, Kekuna never had a chance to express that thought or to otherwise work with Sussel. RT 12/20/90 p.m. at 15:25-16:17, 40:16-41:10, 42:25-43:8.

49. Reallocation is a process which has been used by the City for more than thirty years. RT 12/11/90 at 107:15-23.

50. The rules adopted by the City's Civil Service Commission provide for reallocations, including reallocations downward. Rule 1.1-C.32,33.

51. Mr. Richard Takakawa, employed by the Department of Civil Service for the City and County of Honolulu for over thirty years, together with others on his staff, reviewed and processed all documents relative to Sussel's downward reallocation, as he does for all reallocations, in the ordinary course of his duties as the head of the Classification and Pay Division. RT 12/10/90 at 203:12-23, 215:23-216:8, 216:24-218:23, 219:16-220:15, 221:23-222:1, 223:8-226:17; RT 12/11/90 at 121:15-124:25, 133:4-134:3.

52. Sussel's downward reallocation was effected in a manner that preserved his salary of his former classification. This was done by a process known as temporary differential pay or, as commonly referred, "red circling." RT 12/19/90 at 77:22-79:24.

53. The downward reallocation was processed in one day because of the desire to promptly resolve the dilemma raised at the January 9, 1985, meeting. RT 12/18/90 at 228:20-229:2. Personnel actions, including downward reallocations, which are processed in one day are neither unusual nor uncommon. RT 12/11/90 at 133:4-11, 139:6-140:1.

54. A request to reallocate is normally initiated by the appointing authority. It then proceeds to the Budget Department and then to the Managing Director's office for signature and approval, then finally to the Director of Civil Service for her signature and approval. All this was done in Sussel's case. RT 12/14/90 at 96:19-98:9. There was some confusion in this instance as to when Anderson signed the request to reallocate since he served in two capacities as the Managing Director and the appointing authority. However, since all signatures necessary to effectuate the reallocation were obtained on the same day, the timing of Anderson's signatures in either capacity is of little consequence. Therefore, the Special Master finds that Sussel's reallocation was processed in the normal course through proper and standard civil service procedures.

55. The Special Master also finds that with the particular legal and civil service expertise and experience held by Fukuda and Wurdeman, that a good faith effort was made to find the

most appropriate method to resolve the dilemma and their intentions were not improper when the decision was made to reallocate Sussel.

56. Sussel contends that he was not downwardly reallocated, but that he was demoted, because he lost future pay and benefits and was stripped of supervisory authority.

57. This contention is not supported by the facts: Sussel did not lose any pay. Sussel was not taken out of Position CD 300 and placed in a lower position with lower pay. The change in his duties necessitated a reallocation of his position from Executive Assistant I, EM-07, to Administrative Assistant II, SR-21, but his position of CD 300 remained the same. RT 12/11/90 at 109:9-14; RT 12/19/90 at 186:23-198:10, 199:15-21; RT 12/20/90 a.m. at 30:13-28.

58. The EM pay track applicable to CD 300, Executive Assistant I, was higher than the SR pay track applicable to CD 300, Administrative Assistant II. By applying the temporary differential pay, Sussel maintained the same pay as Administrative Assistant II that he had as Executive Assistant I. RT 12/19/90 at 77:22-79:24.

59. All the expert witnesses agreed on the distinction provided in the civil service rules between a reallocation downward and a demotion. A reallocation downward involves the movement downward of a *position* while a demotion involves the movement of an *employee* to a lower class of pay. RT 12/17/90 at 82:19-20, 118:14-119:13, 120:5-14; Kunioka Deposition Transcript ("KDT") 9/7/88 at 133:12-24.

60. The Special Master finds that Mr. Wallace Kunioka's testimony equating of the two processes even after recognizing the aforementioned distinction is not credible and therefore, the Special Master rejects this view.

61. In arriving at his opinion that it is theoretically possible that a downward reallocation and demotion can be one and the same in a single instance if the downward reallocation involves a loss of pay or future benefits, Dr. Ronald Perry, Sussel's civil service expert, did not take into account *Gallas v.*

Sanchez, 48 Haw. 370 (1965), a Hawaii Supreme Court case which the Special Master feels would have affected Dr. Perry's opinion had he considered the case in arriving at his opinion. Therefore, the Special Master disregards this opinion.

62. The Special Master finds Sussel is currently still employed by the City and occupies Position CD 300, the same position he occupied before the Mayor took office.

63. Any Finding of Fact herein that should more properly be construed as a Conclusion of Law shall be deemed to be such.

64. Any of the following Conclusions of Law which should more properly be construed as a Finding of Fact shall be deemed to be such.

CONCLUSIONS OF LAW

From the foregoing facts, the Court makes the following conclusions of law:

1. The Mayor has the power to "exercise direct supervision" over any agency of the City, and through the Managing Director exercises supervision over all other executive agencies of the City. RCH §§ 5-103, 5-103(a).

2. The Mayor also has the authority to assign new duties and functions to departments of the executive branch, to coordinate all administrative activities, create or abolish positions and appoint a representative who shall, subject to the Mayor's direction, perform such duties as the Mayor may designate. RCH §§ 4-201, 5-103.

3. The Managing Director, pursuant to his Charter powers, has the authority to supervise the heads of all exeuctive departments and agencies assigned to the Managing Director, and such executive departments and agencies shall report directly to the Managing Director as principal administrative aide to the Mayor. RCH §§ 4-102, 6-102.

4. The Civil Defense Agency is an executive agency that is supervised by and reports directly to the Managing Director.

RCH §§ 4-102, 6-104. The Special Master concludes that pursuant to the powers and authorites above-mentioned, the Mayor was empowered and authorized to appoint Kekuna as Deputy Director-Designate of the Civil Defense in place of the Mayor to oversee the City's civil defense agency.

5. The findings show that when Kekuna was appointed as Deputy Director-Designate to oversee the City's civil defense agency and was operating out of the Managing Director's office, the City administration had no intention of displacing Sussel from his position at the Civil Defense Agency. Kekuna's appointment is separate and apart from the personnel action taken against Sussel and therefore, the motivation behind *Kekuna's* appointment is irrelevant to this appeal. Even if relevant, since Sussel was not removed to make room for Kekuna, Sussel's personnel action could not have been motivated by any political commitment owed to Kekuna by the Mayor or the Managing Director.

6. Moreover, the findings show that the Blue Ribbon Committee made their recommendatiions without any consideration of applicants' political affiliation, and therefore, there has been no showing that the Mayor's selection of Kekuna was in any way politically motivated.

7. There being no indication of political party preference in the selection process and no intention to hire Kekuna to replace Sussel, there is no evidence which tends to show that the personnel action affecting Sussel was motivated by politics. Therefore, the Special Master concludes, as a matter of law, that Sussel's reallocation was not motivated by politics.

8. The Director of Civil Service "shall be responsible for the . . . execution of the personnel program . . . and rules and regulations authorized by this charter. RCH § 6-305.2. The rules are to cover *inter alia*, "appointments, promotions, removals and other personnel matters . . . and position classifications. RCH § 6-311.2(a), (b).

9. All public officers are presumed to have discharged their duties faithfully, and to have complied with procedural requirements, in the absence of any evidence to the contrary. *Mitchell v. BWK Joint Venture*, 57 Haw. 535, 560 P.2d 1292 (1977). The findings show that all the civil service procedures necessary to effectuate a reallocation downward were complied with.

10. The Special Master therefore concludes that Position CD 300, Executive Assistant I, was duly reallocated downward to CD 300, Administrative Assistant II, in accordance with the Civil Service Rule 1.1-D.1.2-g, and Rule 1.1-E.6.1.

11. The reclassification of a position cannot be set aside unless it is clearly arbitrary, capricious or illegal. *Greenwald v. Schecter*, 17 Misc. 2d 611, 188 N.Y.S.2d 751 (1959). Having failed to produce any evidence that his reallocation was arbitrary, capricious or illegal, the Special Master concludes that Sussel's reallocation was lawful.

12. The findings show that the city administration did not attempt to reallocate Sussel until after the January 9, 1985, meeting wherein Sussel's representatives expressed Sussel's concern over his liability for actions of the agency when he no longer had the same responsibilities. Although Sussel denied expressing concern over liability, the facts are to the contrary and regardless, the Special Master concludes that Mr. Ahue, as Sussel's union representative, and Mr. Khim, as Sussel's attorney, acted as agents of Sussel with the authority to make binding statements on Sussel's behalf upon which city officials were entitled to rely. The Special Master also concludes that the reallocation was brought about as a direct result of the expressions of concern over liability at the January 9, 1985, meeting.

13. A demotion is the movement of an individual out of a position to another position with lower pay. Rule 1.1-C.10, Rules of the Civil Service Commission. The findings show that Sussel did not receive any less pay as a result of the personnel action since his salary was "red-circled," allowing him to receive

"temporary differential" pay to equal his salary before the reallocation. Therefore, the Special Master concludes that Sussel did not suffer any loss in pay as a result of the reallocation.

14. Additionally, civil service status is not a vested right and pensions or annuity benefits expectant upon such status are not vested property rights. *Gallas v. Sanchez*, 48 Haw. 370, 405 P.2d 772 (1965). One has no property right in an unearned salary. *Id.* Therefore, the Special Master concludes that Sussel has no vested right in any salary raises or retirement benefits that he *might* have received before the reallocation, and consequently has not suffered any loss of benefits in the form of salary raises or retirement benefits.

15. Therefore, since Sussel did not receive a cut in pay, nor was he entitled to any salary increases or retirement benefits that he might have received in his previous position before reallocation, the Special Master concludes, as a matter of law, that Sussel was not demoted.

16. Moreover, turning in his keys to the front door and the executive toilet, and no longer being spokesperson for the City's civil defense agency, or no longer being required to respond to night emergencies are all reasonable consequences of the reallocation of his duties and they do not constitute a demotion.

DATED: Honolulu, Hawaii, March 20, 1991.

/s/ Caron M. Inagaki
PAUL DEVENS
CARON M. INAGAKI
Attorneys for APPELLEES
except FRANK F. FASI

APPENDIX D

STAR-BULLETIN Wednesday, June 19, 1991 ■ A-5

Sussel outraged after being dealt a setback

By Jeanne Mariani, *Star-Bulletin*

Malcolm Sussel sat motionless as the city Civil Service Commission slapped down his appeal to be reinstated as head of the Oahu Civil Defense Agency.

Sussel, who says he was wrongfully ousted by Mayor Frank Fasi in 1985, has been in and out of court battling what he calls a political injustice.

His silence quickly turned to rage at the realization that his six-year saga will continue. He plans to appeal the commission's decision to Circuit Court.

Sussel, looking thin and visibly worn, said he and his family have received telephone death threats telling him to "lay off Mayor Fasi."

Commissioners may also be victims of that intimidation, Sussel said.

Fasi said Sussel's claim is totally false.

"I feel sorry for the man. He's mentally sick," Fasi said.

Sussel said he will not "lay off," and that he is prepared to go as far as the state Supreme Court.

"As long as I have a breath left in my body I will go on with this thing. I have a provision in my will that if I die my family will continue with this thing," he said.

> "*As long as I have a breath left in my body, I will go on with this thing. I have a provision in my will that if I die my family will continue with this thing.*"
>
> **Malcolm Sussel**
> Former director
> Honolulu Civil Defense Agency

The commissioners, who are appointed by Mayor Fasi and confirmed by the City Council, are in Fasi's political pocket, Sussel said.

"The mayor has broken the law, and nobody will stand up to him," Sussel said after yesterday's Civil Service Commission hearing.

Sussel said the mayor replaced him without cause and without the required 10-day notice, violating his rights as a civil

service employee. He was moved to a smaller office, had his agency car taken from him, and was told that George Kekuna would head the agency.

Although he drew the same pay, Sussel said his role with the Civil Defense Agency amounted to an "office boy."

> "*I feel sorry for the man. He's mentally sick.*"
>
> **Frank Fasi**
> Honolulu Mayor

But the mayor argued earlier that he had the right and the responsibility to choose who should lead the agency and best serve the city.

Fasi said earlier that Sussel had asked to be relieved of some of the liabilities associated with the job. He called the case "much to do about nothing."

"The ruling speaks for itself," Fasi said yesterday.

The commissioners refused to give reasons for their decision. Their reasons will be made public in a report during their next meeting on June 26, said commission Chairwoman Beverly Nagy.

The commissioners do not have to justify their votes at this time, Nagy said during the hearing.

Dennis King, Sussel's attorney, disagreed.

"All we heard today was a decision with no reasons why," King said. "I think it's extremely unusual that you won't publicly state the reasons for your decision, and it is important for the appearance of fairness in this trial."

Nagy and other commissioners refused, saying their individual decisions involved massive amounts of information and preparation.

"We are not going to submit to any questions in regard to our relationship with the mayor," Nagy said.

"You're going to have to wait until the next meeting," she told reporters after the meeting.

King said he will file an appeal for Sussel within 30 days after the commission issues its decision in writing.

Sussel had been on sick leave for more than a year until April 1990, when his leave ran out. He had been on leave without pay for a year after that before returning to work last April.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

MALCOLM A. SUSSEL, *Plaintiff.* vs. CITY AND COUNTY OF HONOLULU, et al., *Defendants.*	) CIVIL NO. 86-01136 DAE

PARTIAL TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on Tuesday, May 28, 1991, at 10:30 A.M., at Honolulu, Hawaii,

BEFORE:

HONORABLE DAVID A. EZRA,
U.S. District Judge.

APPEARANCES:

DENNIS W. KING, Esq.
Deeley & King
810 Richards Street
Suite 810
Honolulu, Hawaii — Attorney for the Plaintiff;

PAUL DEVENS, Esq.
Ikazaki, Devens, Lo,
Youth & Nakano
1600 Central Pacific Plaza
220 South King Street
Honolulu, Hawaii — Attorney for the Defendant City and County of Honolulu and other certain Defendants;

Yukie H. Ichikawa, Official Court Reporter, Honolulu, Hawaii

STEVEN M. NAKASHIMA, Esq.
McCorriston Miho & Miller
500 Ala Moana Boulevard
Honolulu, Hawaii — Attorney for the Defendant Frank F. Fasi;

CYNTHIA THIELEN, Esq.
Law Offices of
Cynthia Thielen
345 Queen Street
Suite 700
Honolulu, Hawaii — Attorney for the Defendant D.G. "Andy" Anderson;

GREGORY M. SATO, Esq.
Torkildson, Katz, Jossem,
Fonseca, Jaffee & Moore
Amfac Building
15th Floor
700 Bishop Street
Honolulu, Hawaii — Attorney for the Defendant George Kekuna.

Yukie H. Ichikawa, Official Court Reporter, Honolulu, Hawaii

determine whether I should exercise my discretion to remand them. So I don't know, exactly....

MR. KING: Well, Judge, I can see the dilemma. What I was going to propose this morning was something that could avoid the question at least temporarily.

The last order that was entered by the Ninth Circuit was on March 7th. We have until June 5th to file a petition for a writ of certiorari with the Supreme Court, and I have been authorized by my client to do that. That's next Wednesday. We'll be filing that petition.

We would ask that the question just be held in abeyance until the Supreme Court has ruled on the petition. Otherwise, if they were to grant it, and if the appeal to them was successful, we may have federal jurisdictional claims coming back here.

THE COURT: Mr. King, with all due respect to your client's desire to see this go to the Supreme Court, my candid opinion is that you don't have a likelihood of success in getting the United States Supreme Court to grant certiorari on Mr. Sussel's claims. There is nothing novel, No. 1; nothing particularly imperative for the nation as a whole, No. 2. It's much a fact driven set of circumstances. That was made clear in my opinion; that was made clear in the Ninth Circuit's opinion. This is not the kind of case that the United States Supreme Court takes on certiorari on

a regular basis. They turn down thousands of these every year.

I understand that Mr. Sussel has become, if you will, engrossed in this litigation; such that he feels, I'm sure, that his claims are such that the United States Supreme Court must determine them. But they must not determine anything, they have the discretion to determine those cases that they wish to determine; and this just does not appear to be the kind of case which I see the United States Supreme Court granting certiorari on.

MR. KING: I respect your opinion, Judge, but as an attorney for my client, I have an obligation.

THE COURT: Oh, no, I understand; absolutely.

Now, I am going to — I haven't heard from Mr. Devens and his position yet. I mean, what is your position on the merits of this?

Your motion to delay ruling on this is denied. This has dragged on for years, and the ambivalence of the Ninth Circuit with respect to this issue, and the final determination in the last paragraph of this opinion; they should have either reversed this Court or sustained the Court, in my view, on this issue.

To send it back here and to say: You have discretion to hear it or not to hear it. Well, I have already exercised that discretion; I heard it and decided

APPENDIX F

Revised Rules of the Civil Service Commission

1.1—A. RULES OF PRACTICE AND PROCEDURE

* * *

5.1 — STANDING TO APPEAL.

a. **Appeals from Disciplinary Actions.** Any regular employee who is reprimanded, suspended, dismissed or demoted may appeal to the Commission in accordance with Rule 11, Appeals and Hearings and Rule 15, Uniform Grievance Procedure, of the Civil Service Rules, except as otherwise provided by rule.

b. **Appeals from Action of Director or Appointing Authority.** As to any matter within the scope of Article VI, Chapter 3, Revised Charter of the City and County of Honolulu, any person suffering legal wrong or adversely affected or aggrieved because of any action by the Director or the appointing authority may appeal to the Commission, except that in the event such person is an employee, the appeal shall conform to procedures of Rule 11, Appeals and Hearings, or Rule 15, Uniform Grievance Procedure, of the Civil Service Rules as appropriate.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL,	)	CA NOS. 89-15652
	)	89-15697
Plaintiff/	)	89-15777
Appellant/	)	89-15778
Cross-Appellee,	)	89-15779
vs.	)	89-15780
	)	
CITY AND COUNTY OF HONOLULU, et al.,	)	DC Nos. CV-86-1136-DAE
	)	CV-88-00375-DAE
	)	
Defendant/	)	For the District of Hawaii
Appellees,	)	
and	)	
	)	
FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu, et al.,	)	
	)	
Defendants/	)	
Appellees/	)	
Cross-Appellants.	)	
	)	

PARTIAL TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on appeal on Monday, April 9, 1990, commencing at 1:30 P.M., at the United States Courthouse, Prince Kuhio Federal Building, 300 Ala Moana Blvd., Honolulu, Hawaii 96850 pursuant to Notice.

BEFORE: The Honorable Harry Pregerson
The Honorable Jerome Farris
The Honorable Pamela Rymer

APPEARANCES:

For the Plaintiff/ Appellant/Cross-Appellee:	DENNIS W. KING, ESQ. WILLIAM J. DEELEY, ESQ. Suite 810, City Center 810 Richards Street Honolulu, Hawaii 96813
For the Defendants City and County of Honolulu, Jeremy Harris, Civil Service Commission of the City and County of Honolulu, Hiroo W. Miyagi, Ernest K. Dias, Moises L. Tacazon, Patricia K. Salsbury, Isabel M. Tagala and Beverly Nagy, in their respective official capacities:	PAULA DEVENS, ESQ. PAUL DEVENS, ESQ. Central Pacific Plaza Suite 1600 220 S. King Honolulu, Hawaii 96813
For the Defendant Frank F. Fasi:	STEVEN NAKASHIMA, ESQ. LORI AQUINO, ESQ. 1600 Bancorp 130 Merchant Street Honolulu, Hawaii 96813 and WILLIAM McCORRISTON, ESQ. Five Waterfront Plaza Suite 400 500 Ala Moana Blvd. Honolulu, Hawaii 96813
For Defendant D. G. "Andy" Anderson:	CYNTHIA H. THIELEN, ESQ. BOYCE R. BROWN, JR., ESQ. STANLEY LEVIN, ESQ. 345 Queen Street, Suite 700 Honolulu, Hawaii 96813
For Defendant George Kekuna:	GREGORY SATO, ESQ. Amfac Building, 15th Floor 700 Bishop Street Honolulu, Hawaii 96813

because he was not, twice, he has no cause of action.

MS. DEVENS: Yes.

JUDGE FARRIS: All right.

MS. DEVENS: And I would also —

JUDGE FARRIS: Mr. King probably is clear about — it was clearer that without the summary, but at least I hope he's clear now and he can respond.

MS. DEVENS: And that's why I think that the court's demotion finding, a footnote for it is dictum.

The court didn't give it a considered analysis. If you look at the rules that define what a demotion is and what downward rellaction is —

JUDGE FARRIS: Well, we know what the court did. The court relied on the testimony of a one person who said he was demoted. That's all the court did.

He didn't make a factual finding, he made a statement based on a statement made by a person who had, as Mr. King properly argued, stated that that's what happened. She was in a position to know so the judge took that as what happened. Isn't that pretty much what the record shows?

MS. DEVENS: Yes.

JUDGE FARRIS: I'm not trying to limit your argument, but do you have anything further?

MS. DEVENS: No, I think you're doing a fine job.

JUDGE FARRIS: A fine job of limiting you?

APPENDIX H

Hawaii Revised Statutes (1985 Replacement)

§91-9 Contested cases; notice; hearing; records. (a) In any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.

(b) The notice shall include a statement of:

(1) The date, time, place, and nature of hearing;

(2) The legal authority under which the hearing is to be held;

(3) The particular sections of the statutes and rules involved;

(4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;

(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.

(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.

(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.

(e) For the purpose of agency decisions, the record shall include:

(1) All pleadings, motions, intermediate rulings;

(2) Evidence received or considered, including oral testimony, exhibits, and a statement of matters officially noticed;

(3) Offers of proof and rulings thereon;

(4) Proposed findings and exceptions;
(5) Report of the officer who presided at the hearing;
(6) Staff memoranda submitted to members of the agency in connection with their consideration of the case.

(f) It shall not be necessary to transcribe the record unless requested for purposes of rehearing or court review.

(g) No matters outside the record shall be considered by the agency in making its decision except as provided herein.

* * *

§91-14 Judicial review of contested cases. (a) Any person aggrieved by a final decision and order in a contested case or by a preliminary ruling of the nature that deferral of review pending entry of a subsequent final decision would deprive appellant of adequate relief is entitled to judicial review thereof under this chapter; but nothing in this section shall be deemed to prevent resort to other means of review, redress, relief, trial de novo, including the right of trial by jury, provided by law.

(b) Except as otherwise provided herein, proceedings for review shall be instituted in the circuit court within thirty days after the preliminary ruling or within thirty days after service of the certified copy of the final decision and order of the agency pursuant to rule of court except where a statute provides for a direct appeal to the supreme court, which appeal shall be subject to chapter 602, and in such cases the appeal shall be in like manner as an appeal from the circuit court to the supreme court, including payment of the fee prescribed by section 607.5 for filing the notice of appeal (except in cases appealed under sections 11-51 and 40-91). The court in its discretion may permit other interested persons to intervene.

(c) The proceedings for review shall not stay enforcement of the agency decisions or the confirmation of any fine as a judgment pursuant to section 92-17(g); but the reviewing court may order a stay if the following criteria have been met:

(1) There is likelihood that the subject person will prevail on the merits of an appeal from the administrative proceeding to the court;

(2) Irreparable damage to the subject person will result if a stay is not ordered;

(3) No irreparable damage to the public will result from the stay order; and

(4) Public interest will be served by the stay order.

(d) Within twenty days after the determination of the contents of the record on appeal in the manner provided by the rules of court, or within such further time as the court may allow, the agency shall transmit to the reviewing court the record of the proceeding under review. The court may require or permit subsequent corrections or additions to the record when deemed desirable.

(e) If, before the date set for hearing, application is made to the court for leave to present additional evidence material to the issue in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon such conditions as the court deems proper. The agency may modify its findings, decision, and order by reason of the additional evidence and shall file with the reviewing court, to become a part of the record, the additional evidence, together with any modifications or new findings or decision.

(f) The review shall be conducted by the appropriate court without a jury and shall be confined to the record, except that in the cases where a trial de novo, including trial by jury, is provided by law and also in cases of alleged irregularities in procedure before the agency not shown in the record, testimony thereon may be taken in court. The court shall, upon request by any party, hear oral arguments and receive written briefs.

(g) Upon review of the record the court may affirm the decision of the agency or remand the case with instructions for further proceedings; or it may reverse or modify the decision and order if the substantial rights of the petitioners may have been prejudiced because the administrative findings, conclusions, decisions, or orders are:

(1) In violation of constitutional or statutory provisions; or

(2) In excess of the statutory authority or jurisdiction of the agency; or

(3) Made upon unlawful procedure; or

(4) Affected by other error of law; or

(5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or

(6) Arbitrary, or capricious, or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

(h) Upon a trial de novo, including a trial by jury as provided by law, the court shall transmit to the agency its decision and order with instructions to comply with the order.

Supreme Court, U.S.
FILED
SEP 10 1991
OFFICE OF THE CLERK

(3)

No. 91-88

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MALCOLM A. SUSSEL,

Petitioner,

v.

CITY AND COUNTY OF HONOLULU, and FRANK F. FASI, in his individual capacity and his official capacity as Mayor of the City and County of Honolulu; D.G. "ANDY" ANDERSON, in his individual capacity and his official capacity as former Managing Director of the City and County of Honolulu; LORETTA K. FUKUDA, in her individual capacity and her official capacity as Director of the Department of Civil Service of the City and County of Honolulu; GEORGE KEKUNA, in his individual capacity and his official capacity as Administrative Assistant to the Managing Director of the City and County of Honolulu; JEREMY HARRIS, in his official capacity as Managing Director of the City and County of Honolulu; CIVIL SERVICE COMMISSION OF THE CITY AND COUNTY OF HONOLULU; HIROO W. MIYAGI; ERNEST K. DIAS; MOISES L. TACAZON; PATRICIA K. SALSBURY; ISABEL M. TAGALA; and BEVERLY NAGY, in their official capacities as Commissioners of the City and County of Honolulu,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:
DAVIS & LEVIN
STANLEY E. LEVIN, ESQ.*
*Counsel of Record
10 Marin Street
Honolulu, Hawaii 96813
Tel. No. (808) 524-7500

CYNTHIA H. THIELEN, ESQ.
345 Queen Street, Ste. 700
Honolulu, Hawaii 96813
Tel. No. (808) 599-4141

Attorneys for Respondent
D.G. "ANDY" ANDERSON

WILLIAM C. MCCORRISTON, ESQ.
Five Waterfront Plaza, 4th Flr.
400 Ala Moana Boulevard
Honolulu, Hawaii 96813
Tel. No. (808) 529-7300

STEVEN M. NAKASHIMA, ESQ.
130 Merchant Street, 16th Flr.
Honolulu, Hawaii 96813
Tel. No. (808) 547-5600

Attorneys for Respondent
FRANK F. FASI

BARRY W. MARR
PATRICK H. JONES, ESQ.
2200 Pacific Tower
1001 Bishop Street
Honolulu, Hawaii 96813
Tel. No. (808) 523-2500

Attorneys for Respondent
LORETTA K. FUKUDA

JARED H. JOSSEM, ESQ.
GREGORY M. SATO, ESQ.
Amfac Tower, 15th Floor
700 Bishop Street
Honolulu, Hawaii 96813
Tel. No. (808) 521-1051

Attorneys for Respondent
GEORGE KEKUNA

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

MALCOLM A. SUSSEL, Petitioner

v.

CITY AND COUNTY OF HONOLULU, et al., Respondents[1]

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

JOINT BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents FRANK F. FASI, D.G. "ANDY" ANDERSON, LORETTA K. FUKUDA, and GEORGE KEKUNA respectfully pray that the Petition for Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit be denied.

---

[1]All parties in this proceeding are listed in the caption on the cover of this Joint Brief In Opposition To Petition for Writ of Certiorari. Respondent CITY AND COUNTY OF HONOLULU has filed a separate Brief In Opposition to Petition for Writ of Certiorari.

I. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED[2]

In addition to the constitutional and statutory provisions set forth in Petitioner's Petition, Respondents add the following:

Hawaii Revised Statutes, §128-3(d) Civil Defense Agency

> (d) The director shall, with the approval of the county council, appoint for each political subdivision a deputy director who may be removed by the director. Deputy directors shall serve without compensation from the State but shall receive such compensation as may be provided by the political subdivision pursuant to chapter 77. Chapter 76 shall apply to full-time deputy directors. Part-time deputy directors may hold other office or employment in the state government, or any political subdivision. Each deputy director, subject to the direction and control of the director, shall be the head of all local organizations for civil defense within the political subdivision for which the deputy director is appointed.

Revised Charter of the City and County of Honolulu

> Section 6-104. Civil Defense Agency — There shall be a civil defense agency headed by a civil defense administrator who shall be appointed and may be removed by the mayor in accordance with law. The civil defense administrator shall:
>
> (a) Develop, prepare and, under disaster or emergency situations, assist in the implementation of civil defense plans and programs to protect and promote the public health, safety and welfare of the people of the city.

---

[2] No changes or additions have been made to the Questions Presented, Opinion Below, or Jurisdiction sections contained in Petitioner's Brief.

(b) Coordinate the civil defense activities and functions of the city with those of the State and federal governments and other public or private organizations for civil defense within the State.

Section 13-103(a). Boards and Commissions
Except as otherwise provided by this charter or by law, all boards and commissions established by this charter or by ordinance shall be governed by the following provisions:
(a) All members shall be appointed by the mayor and confirmed by the council.

Section 13-103(h). Boards and Commissions
(h) The affirmative vote of a majority of the entire membership shall be necessary to take any action, and such action shall be made at a meeting open to the public.

Section 6-310.1. Civil Service Commission Membership. The civil service commission shall consist of five members who shall believe in the principles of the merit system in public employment.

Revised Rules of the Civil Service Commission, Rule 1.1-A.1.6.e

e. Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Commission is entitled shall constitute a quorum to transact business, and the concurrence of a majority of all members to which the Commission is entitled shall be necessary to make valid any action of the Commission.

II. STATEMENT OF THE CASE

This action involves an employment dispute between the employer, City and County of Honolulu ("City") and its employee, Petitioner, Malcolm A. Sussel, who is still employed by the City at no reduction in his salary. The fundamental issues in this case require the interpretation and application of the City's

Revised Rules of the Civil Service Commission. Those issues are whether Petitioner was demoted or whether his position was downwardly reallocated as provided under the applicable civil service rules. Those issues have been remanded in this matter from the U.S. District Court to the State Court. In turn, the State Court stayed its proceedings to allow the Civil Service Commission ("Commission") to decide the issues. The Commission has rendered its decision, *See*, City and County's Brief, Appendix C, Commission's Final Decision and Order, ("City's Appendix C"), and Petitioner's appeal of that administrative decision is now pending before the State Circuit Court.

A. Relevant Facts

1. Petitioner's Reallocation

Petitioner served as the "head" of the City's Oahu Civil Defense Agency ("OCDA") from 1982 to the end of 1984 under the administration of Mayor Eileen Anderson. The head of civil defense is charged with the administration of island-wide civil defense programs and must therefore work in close harmony with the City Administration and State Civil Defense Administrator and staff. During Petitioner's term as head of civil defense, strained relationships developed between the State and City civil defense agencies.[3]

Following the election of Respondent Frank F. Fasi in 1984 as Mayor of the City ("Mayor Fasi"), Mayor Fasi appointed a bi-partisan citizen advisory committee, the Blue Ribbon Selection Committee, to interview candidates and recommend the most qualified to head up the various departments in his new administration, including civil defense. The Blue Ribbon Selection Committee recommended two people to Mayor Fasi for Civil Defense Administrator with Respondent George Kekuna, a former Lieutenant Colonel in the United States Air Force, who was at that time the Disaster Planner for the State Civil Defense Agency, as the Blue Ribbon Selection Committee's top choice. Accordingly, Mayor Fasi announced

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[3] The break in relationships between the State Civil Defense Administration and OCDA were admitted by Petitioner, himself, in his January 2, 1985 memorandum to Respondent Mayor Frank F. Fasi. Petitioner's Brief, Appendix C, page 37a-38a.

that he would name Mr. Kekuna to be the new head of the City's civil defense.

In response to Mayor Fasi's announcement that George Kekuna would be the new head of civil defense, Petitioner wrote a letter to the Mayor asking him to "reserve judgment on the status of [his] position and qualifications as Administrator of OCDA" and requested a personal meeting with the Mayor. On December 15, 1984, Mayor Fasi and Petitioner met, at which time Sussel asserted he was a civil service employee and, as such, could not be removed by the Mayor from his position as head of civil defense. Mayor Fasi disputed Sussel's contention, and upon assuming office in January of 1985, he appointed Mr.Kekuna as an Executive Assistant with the title of Deputy Director Designate to oversee and supervise the City Civil Defense.[4] Sussel was informed at this time that he would remain employed with civil defense and continue to receive the same pay but would be subject to the authority of Mr. Kekuna. Thereafter, Petitioner's job description was revised to reflect changes in his duties and responsibilities, and his position was reallocated or reclassified to conform to the City's civil service classification system. However, Petitioner continued to receive the same pay as required under civil service rules.

2. Petitioner's Civil Service And State Court Actions

Because he believed the City's actions constituted a demotion, Petitioner appealed the reallocation to the Civil Service Commission. He contended that the "demotion" was politically motivated and a violation of the Civil Service policies and rules. After a Civil Service evidentiary hearing in October of 1985, the Commission ruled that Petitioner's position, Civil Defense Administrator, was not a Civil Service position and that Petitioner, accordingly, was not protected by Civil Service procedures.

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[4] The Mayor was appointed Deputy Director of the County's Civil Defense by the State Director of Civil Defense in accordance with State law, Hawaii Revised Statutes, Chapter 128. Mr. Kekuna, as Deputy Director Designate, was delegated the Mayor's authority as Deputy Director of Civil Defense.

Petitioner appealed that administrative decision to the State Circuit Court. Over a year later in May of 1987, the Circuit Court reversed the Commission's decision and held that the Petitioner's position was subject to Civil Service protection. The Court remanded the case to the Commission for further proceedings to determine whether Petitioner had been afforded the procedures required under the civil service rules.

At no time in his appeal to the State Circuit Court did Petitioner raise any contention that Commission members were biased against him or that there were any circumstances which could give rise to an appearance of impropriety as to any Commission member.

On the remand from the State Circuit Court to the Commission, Petitioner, in December of 1987, filed for the first time motions to disqualify the Commissioners on the basis of personal bias and prejudice. *See, Sussel v. City and County of Honolulu, et al.*, Nos. 13430 and 13484, *slip. op.* at 4 (Haw. S.Ct. Dec. 19, 1989), Appendix 1. However, in seeking to disqualify the Commissioners, Petitioner was not objecting to the earlier October, 1985 Civil Service hearing, but rather, Petitioner was objecting to having any of the Commissioners hear the remanded Civil Service case because he had brought suit against all the Commissioners in Federal Court in December of 1986 in *Sussel v. City & County of Honolulu, et al.*, No. 86-1136 (D. Haw. *Dec. 15, 1986*).

When the disqualification motions were denied by the Commission, Petitioner filed a civil action in the Circuit Court, *Sussel v. City and County of Honolulu, et al.*, Civil No. 88-1285-04 (1st Cir. Ct., State of Haw. April 1988). There he reiterated the claims he had alleged in the 1986 federal action and he asserted a new claim against the Commissioners because of their refusal to remove themselves from hearing his Civil Service proceeding. That State Court suit was removed to the Federal District Court in June of 1988 (U.S. Dist. Ct. Civil No. 88-00375) and consolidated with the earlier civil action.

In August of 1988, Mr. Sussel brought yet another action in the State Circuit Court to enjoin all the Commissioners from further participating in the remanded Civil Service proceedings. *Sussel v. City & County of Honolulu Civil Service Commission, et al.*, Civil No.88-2509-08 (1st Cir. Ct. Haw. 1988).

The State Court enjoined only one Commissioner from participating in any further hearings and ruled that Petitioner's hearing before the Commission could proceed as long as a quorum was established as required by State law.

On October 31, 1988, Petitioner appealed that Circuit Court decision to the Hawaii Supreme Court and obtained a stay from the Hawaii Supreme Court of all Commission activities on Petitioner's case pending a final determination by the Hawaii Supreme Court.

More than a year later on December 19, 1989, the Hawaii Supreme Court entered its decision on Petitioner's appeal, which resulted in the disqualification of two of the five Commission members on the basis of "an appearance of impropriety" standard. Appendix 1.

3. Federal Court And Remanded Proceedings

In March of 1989, the District Court ruled on the parties' various motions to dismiss or for summary judgment in the consolidated cases, DC No. 86-1136 (federal) and DC No. 88-00375 (removed). Petitioner's Brief, Appendix C. As a result, dismissal or summary judgment was granted to Respondents as to all of the Petitioner's federal causes of action, including Petitioner's 42 U.S.C. §1983, Fourteenth and 1st Amendment claims. Additionally, summary judgment was granted to Respondents on various state common law claims, including Petitioner's causes of action for defamation.

The District Court dismissed without prejudice all remaining state law causes of actions in DC No. 86-1136 and remanded to the State Circuit Court all identical, remaining state law causes of actions in DC No. 88-00375.

On appeal to the 9th Circuit, the 9th Circuit affirmed the District Court with regard to the District Court's grant of summary judgment in favor of Respondents on all of Petitioner's federal causes of action. Petitioner's Brief, Appendices A & B.

Subsequent to the filing of the appeal to the 9th Circuit, the remanded State Court proceedings were stayed pending the final outcome of the Civil Service proceedings. The issues before the Commission were whether Petitioner was demoted or downwardly reallocated, and whether Petitioner was subjected to political discrimination. From December,

1990 through January, 1991, an eleven day Civil Service evidentiary hearing was held to decide these issues. The five member Commission unanimously ruled that Petitioner had not been demoted, but rather had been properly downwardly reallocated as provided under the City's Civil Service rules and that no political discrimination had been involved in the actions taken. City's Appendix C. Petitioner's appeal of the Commission's Final Decision and Order is now pending before the State Circuit Court, and the parties are entitled to appeal that Circuit Court decision to the Hawaii Supreme Court.

III. REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

A. The Controversy Is Based Upon County Or State Law Issues And Presents No Federal Questions Of Substance.

A writ of certiorari should not be granted where the controversy primarily implicates questions of County or State law and presents no federal questions of substance. *Wolf v. Weinstein*, 372 U.S. 633, *reh. den.* 373 U.S. 928 (1963). This is such a case.

In essence, the courts below determined that Petitioner had no viable federal cause of action, and that to the extent Petitioner was entitled to redress, such redress would or should be through the state system.[5] And, rightly so, as all of Petitioner's claims are premised on state law issues which are, at the present time, being addressed by the Civil Service Commission and the State Courts.

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[5] That determination could properly be based upon abstention under *Pullman v. Railroad Commission*, 312 U.S. 496 (1941), where a difficult and unsettled question of state law must be resolved before a federal question can be decided, *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984); or upon a determination under *Parratt v. Taylor*, 451 U.S. 527 (1981), overruled on other grounds, *Daniels v. Williams*, 474 U.S. 327 (1986), that there is no cause of action for a denial of due process as adequate state procedures are still available.

As set forth above, when all is said and done, this case involves an employment dispute between the City and one of its employees and whether the employee was afforded the procedures provided under the City's Civil Service laws.

After the District Court remanded the state law claims to the State Court, the State Court proceedings were stayed to allow the Commission to rule on the civil service issues. Thereafter, the five member Commission unanimously ruled that Petitioner had not been demoted, but rather had been properly downwardly reallocated[6] in accordance with the City's civil service rules and that no political discrimination had been involved in the actions taken. City's Appendix C. Petitioner's appeal of that decision is now pending in the State Circuit Court and the parties are entitled to appeal the Circuit Court's decision to the Hawaii Supreme Court.

Thus, certiorari should not be granted as the fundamental issues that underlie this entire case are County or State law issues, the determination of which will require the interpretation and application of the City's civil service rules and regulations and State law, and those issues are presently being decided in the State forums.

B. There Is No Conflict Regarding The Application Of *Mt. Healthy's* "But For" Test And, In Any Event, There Was No Political Discrimination.

Petitioner attempts to create an issue for the grant of certiorari by contending that the 9th Circuit has failed to apply the "Mt. Healthy substantial or motivating factor causation test"

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[6] *Bell v. Department of Health and Human Services*, 483 So.2d 945, 948-951 (La. 1986). (Demotions and reallocations are mutually exclusive actions. A demotion is a disciplinary action based upon an evaluation of the job performance of an employee whereas a reallocation is a reclassification of a position within the civil service classification system based upon a change in the duties assigned to the position. Pre-deprivation procedures are required for demotions but not for reallocations.)

as to the claim of political discrimination, and that the 9th Circuit's actions have created a conflict among the circuits.[7] However, not only has Petitioner misconstrued the 9th Circuit's ruling but Petitioner has misinterpreted this Court's decision in *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977).

Mt. Healthy made it clear that even if constitutionally protected conduct played a part or even a substantial part in an adverse employment decision that fact was not enough to establish that a constitutional violation had occurred. *Id.* 429 U.S. at 285. A plaintiff still must prove that the adverse employment decision occurred "because of" the constitutionally protected conduct. *Id.* 429 U.S. at 286. In other words, it is a "but for" standard of causation, *Givhan v. Western Line Consolidated School District*, 439 U.S. 410, 417 (1979), i.e. the adverse employment decision would not have occurred *but for* the fact that the employee engaged in the protected conduct.

The "substantial or motivating factor causation test" that has been raised by Petitioner is simply a burden shifting test that is used in mixed-motive cases to reach the causation issue. The plaintiff has the initial burden of showing that the protected conduct was a "substantial or motivating factor" for the adverse decision. Then the burden shifts to the employer to show that the same decision would have been made even in the absence of the protected conduct. *Mt. Healthy*, 429 U.S. at 287.

However, notwithstanding this burden shifting test, the ultimate question remains whether the adverse employment decision occurred *because of* the protected conduct. Thus, the 9th Circuit's conclusion that Petitioner had not presented sufficient probative evidence that he was removed *because of* his political affiliation is entirely consistent with the *Mt. Healthy* decision.

The court's decision was also consistent with the facts. At best, Petitioner showed that the Mayor and Mr. Kekuna held responsible positions in the same political party and that Mr. Kekuna supported the Mayor's nomination. However, the

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[7] Nor is there even a conflict among the cases cited by Petitioner as all of the cases either adopt or apply the *Mt. Healthy* burden shifting test.

facts established that it was the bi-partisan Blue Ribbon Selection Committee that interviewed the applicants for positions within the incoming Administration and it was the Blue Ribbon Selection Committee that ultimately recommended George Kekuna to Mayor Fasi as the Committee's top choice for the post of civil defense administrator.

Moreover, Petitioner's insistence on contending that a political "commitment" was made by Mayor Fasi to Mr. Kekuna is a distortion of the record.[8] A "commitment" was indeed given to Mr. Kekuna as was the case with other appointees. The "commitment" was that if Mr. Kekuna accepted the Mayor's promise of an appointment and quit his existing civil service job with the State, that Mr. Kekuna would, in fact, be appointed to the City's civil defense position. No more, no less. Outside of Petitioner's repeated conclusory allegations of a political "commitment" having been made by Mayor Fasi to Mr. Kekuna, no evidence was ever submitted by Petitioner that a political commitment had been made by Mayor Fasi to Mr. Kekuna. Thus, the 9th Circuit properly concluded that there was insufficient evidence to support Petitioner's political discrimination claim.

Further, even assuming *arguendo* that Petitioner's reallocation was motivated by political considerations, Petitioner's political affiliation would have been a proper consideration for First Amendment purposes.

The First Amendment protects public employees from discharge because of their political affiliation. *Rutan v. Republican Party of Illinois*, 110 S.Ct. 2729 (1990); *Elrod v. Burns*, 427 U.S. 347 (1976). However, that protection does not apply

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[8] Unfortunately, Petitioner's Brief is replete with these type of unsubstantiated, conclusory statements, most without references to the record.

See, Petitioner's Brief, p. 8 where Petitioner claims that Respondent Anderson "informed a media representative in early 1985 that 'we intend to win in the Civil Service Commission; we'll drag it out until Sussel and HGEA can't afford to continue and will quit.'" Despite ample opportunity to take depositions or submit affidavits on this point, Sussel never produced any evidence to substantiate that this alleged statement was ever even made.

when "the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved." *Branti v. Finkel*, 445 U.S. 507, 518 (1980). Among the factors considered is whether the office involves the formulation of policy, or access to confidential information, or requires the occupant to communicate the views of elected officials to the public or other members of government. *Elrod*, 406 U.S. at 375 (Stewart, J., concurring in the judgment); *Branti*, 445 U.S. at 518.

Courts have developed a two stage *Elrod-Branti* inquiry. The first inquiry is whether "the position involve[s] government decision making on issues where there is room for political disagreement on goals or their implementation." *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236, 241-32 (1st Cir. 1986), *cert. denied*, 481 U.S. 1014 (1987); *see Tomczak v. City of Chicago*, 765 F.2d 633, 641 (7th Cir.), *cert. denied*, 474 U.S. 946 (1985). The second is "to examine the particular responsibilities of the position to determine whether it resembles a policymaker, a privy to confidential information, a communicator or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Jiminez Fuentes*, 807 F.2d at 242; *Tomczak*, 765 F.2d at 641 (court should determine whether officeholder "has meaningful direct or indirect input into the decision making process").

Here, the position of head of civil defense clearly satisfies the first inquiry. While the general goal of civil readiness for emergencies may be widely shared, the role which government should play is properly the subject of partisan disagreement. *See Jiminez Fuentes*, 807 F.2d at 243; *Tomczak*, 765 F.2d at 641 ("there could be principled disagreements" about the operation of city water department).

The position is also one for which political affiliation is a legitimate attribute because the head of civil defense creates the City's civil defense policy and communicates that policy to the public. Section 6-104 of the City Charter provides that the head of civil defense shall "develop [and] prepare civil defense plans and programs...." Further, the Position Description prepared in 1981 states that the official is responsible for the development of "Civil Defense Plans" and for "extensive

planning and coordination involving participation of community groups, private industries, and intergovernmental agencies in affected programs." CR: 518, Ex B; *cf. Jiminez Fuentes*, 807 F.2d at 244.

Moreover, the administrative duties of the civil defense position are extensive and involved significant discretionary authority. CR: 518, Ex.B; *cf. Jiminez Fuentes*, 807 F.2d at 244; *Tomczak*, 765 F.2d at 642. Further, as found by the District Court, Petitioner, in his role as head of civil defense, was the agency's media representative. Petitioner's Brief Appendix C, page 34a; CR: 518, Ex.B; *cf. Jiminez Fuentes*, 807 F.2d at 244.

In *Cordero v. De Jesus-Mendez*, 867 F.2d 1 (1st Cir. 1989), the court found that political affiliation was an appropriate qualification for the position of municipal civil defense director. The court emphasized the policy-making role inherent in preparing civil defense plans, as well as the fact that the director was appointed and removable by the Mayor and was required to work directly with the Mayor. *Id.* at 12-13; *cf.* City Charter Section 6-104 (head of OCDA "shall be appointed and may be removed" by Mayor); CR: 518, Ex. B (head of OCDA shall "[p]erform other duties directed by Mayor/Managing Director").

In sum, Petitioner in his role as the head of civil defense was a policymaking/confidential official who was required to communicate the Administration's position regarding civil defense. Thus, political affiliation would have been a legitimate requirement of such a position, and Petitioner's First Amendment rights were not violated even if his reallocation had been politically motivated. *Jiminez Fuentes*, 807 F.2d at 244.

For all these reasons, certiorari should not be granted on this issue.

C. Petitioner Did Not Preserve Any Issue Regarding Denial Of Due Process In The 1985 Civil Service Hearing And, In Any Event, He Would Not Have Prevailed In The 1985 Hearing.

Petitioner again attempts to manufacture an issue for the grant of certiorari by contending that he was deprived of due process because two Civil Service Commissioners who

participated in the 1985 Civil Service hearing were biased against him.

First, this issue has never been preserved for review. The alleged bias or lack of impartiality of the two Commissioners, Hiroo Miyagi and Ernest Dias, would have occurred during the course of the first Civil Service Commission hearing in October of 1985. However, Petitioner never raised the bias or denial of due process issue in his post hearing brief to the Commission, nor were those issues raised in his appeal to the Circuit Court from the Commission's decision.

In fact, Petitioner first attempted to disqualify the two Commissioners in December, 1987, in an effort to prevent all the Commissioners from further participating in his civil service proceedings after the case had been remanded to the Commission from the Circuit Court. Even then, Petitioner was not contending that he was denied due process or somehow prejudiced in the 1985 Civil Service hearing, but rather, Petitioner was objecting to any of the Commissioners hearing the remanded civil service case because he had now brought suit against all the Commissioners in federal court, *Sussel v. City and County of Honolulu, et al.* No. 86-1136 (D. Haw. Dec.15, 1986).

When the Commissioners refused to disqualify themselves, Petitioner filed a State Court action to enjoin all the Commissioners from further participating in the remanded civil service proceedings.

Thus clearly the issue of bias of the two Commissioners or denial of due process from the 1985 civil service hearing was not preserved for review and should provide no basis for the grant of certiorari.

On the other hand, the Hawaii Supreme Court's disqualification of Mr. Miyagi and Mr. Dias from participating in any further civil service proceedings of Petitioner, ensured that Petitioner's due process rights would not be violated because of a biased or less than impartial Commission. Thus Petitioner's claims of denial of due process are without merit.

Finally, Petitioner's arguments that he would have won in the 1985 Civil Service hearing if the two biased Commissioners had not participated is without any merit. As with the previously discussed issue, this issue was never preserved

for review. Moreover, Petitioner's arguments are simply incorrect. Under the Rules of the Civil Service Commission a majority of the entire membership of the Commission must agree before an action can be deemed invalid.

> e. Quorum and Number of Votes Necessary to Validate Acts. A majority of all members to which the Commission is entitled shall constitute a quorum to transact business, and the *concurrence of a majority of all members to which the Commission is entitled shall be necessary to make valid any action of the Commission.*

Revised Rules of the Civil Service Commission, Rule 1.1-A.1.6.e.; also, City Charter, Section 13-103(h). The Commission is entitled to have five members.[9] City Charter, Section 6-310.1. Thus, all three remaining Commissioners would have had to agree on the decision for it to be valid. A 2-1 vote would have been invalid.

For all these reasons, there is no basis for granting certiorari on this issue.

D. Petitioner's Claims Regarding The Alleged Unreasonableness Of Delay In The Civil Service Process Merely Involves A Review Of Findings Of Fact Which Would Be Of No Importance Except To the Litigants Themselves.

This Court has repeatedly denied petitions for writ of certiorari where the issues presented merely involve review of findings of fact which would be of no importance except to the litigants themselves. *Rudolph v. U.S.*, 370 U.S. 269, 270, *reh. den.* 371 U.S. 854 (1962); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 177 N.8 (1981); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). Such is the nature of Petitioner's contentions regarding the allegedly unreasonable delays in the Civil Service proceedings.

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[9] By Charter, the members of the Commission are appointed by the Mayor subject to confirmation by the City Council. City Charter, Section 13-103.(a).

Here, the District Court reviewed all of the allegations and facts involving the delay between the initial filing of Petitioner's Civil Service Appeal and the rendering of the Commission's decision.

> As noted above, the final commission decision was entered eleven months after plaintiff filed his appeal of his demotion. Although plaintiff argues that this delay amounts to a denial of a timely hearing, this court cannot find as a matter of law that it is one of constitutional proportions. *Loudermill*, 470 U.S. at 547. This court takes judicial notice of the fact that it is not uncommon for actions brought before Boards, Commissions and state and federal courts to take many months or even years before a hearing is held and a decision rendered. Were this delay to be a basis for an action under 42 U.S. C. §1983, the federal courts would be inundated with such actions because delay of some duration is the unfortunate rule in these proceedings rather than the exception.

Petitioner's Appendix C, page 43a.[10]

Moreover, with respect to the delay that occurred after the rendering of the Commission's decision, the District Court again found no constitutional violations and, in fact, the Court found that Petitioner was at least partially responsible for the delays.

> Further, as the procedural history indicates, plaintiff is responsible for at least a share of the

[10]Again, Petitioner erroneously states that the District Court and Court of Appeals failed to address the issue of the delay between the filing of his civil service appeal and the rendering of a decision by the Commission. However, as the above quoted language shows, the District Court specifically addressed the initial delay and found no constitutional violation. That finding was affirmed by the 9th Circuit. Appendix A to Petitioner's Brief, page 9a.

> delay which has occurred since the Commission's decision was initially rendered. This court notes that the petitioning of the Commission and filing of appeals by both parties are valid stratagem and are recognized rights guaranteed by the term "due process". Therefore, this court finds that the delay since January 7, 1986, the date of the original Commission decision, is the result of the appeals process inherent in administrative proceedings and is not fundamentally deficient.

Id.

Thus clearly the issue of the allegedly unreasonable delay provides no basis for the grant of certiorari.

E. There Is No Basis For A Grant Of Certiorari On The Issue Of Deprivation Of A Liberty Interest As Petitioner Specifically Elected Not To Appeal the Judgment Against Him On His Defamation Claim, And, In Any Event, Petitioner Was Neither Stigmatized Nor Deprived Of A Liberty Interest By Respondents' Statements And Actions.

In attempting to establish a cause of action for deprivation of a liberty interest because of statements made by government officials an employee must prove both that (1) the statements were so defamatory that they stigmatized him by calling into question his morality, honesty or loyalty, *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972) *and* that (1) he suffered a tangible loss of employment or employment prospects as a result. *Siegert v. Gilley*, 59 U.S.L.W. 4465, 4467, and 4469 (Marshall, J. dissenting) (May 23, 1991). Thus, establishing that the statements were defamatory is a necessary first step in maintaining a cause of action for deprivation of a liberty interest.

Here, Petitioner cannot even satisfy the first step of showing that he was defamed. The District Court ruled that the allegedly defamatory statements Petitioner complains of were not defamatory and the Court granted summary judgment to the Respondents on the issue of defamation. The District Court's ruling was never appealed. In fact, Petitioner

specifically elected not to appeal that issue. Appendix 2. Therefore, Petitioner has no basis for raising the liberty interest claim in this Petition for Writ of Certiorari.

Even assuming, *arguendo*, that the non-defamatory statements could still somehow stigmatize Petitioner, the statements complained of do not begin to approach the sort of statements which this and other courts have found to be stigmatizing. Examples of stigmatizing statements include ones alleging "dishonesty or immorality." *Board of Regents v. Roth*, 408 U.S. at 573. Other decisions which have found stigmatization concerned allegations of subversive activities, *United States v. Lovett*, 328 U.S. 303 (1946); disloyalty, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Peters v. Hobby*, 349 U.S. 331 (1955); and alcoholism, *Wisconsin v. Constantineau*, 400 U.S. 433 (1971).

The statements which Petitioner asserts stigmatized him essentially state that he did not perform his job well and that he did not work well with others. Petition at 24-25. In light of the decisions of this Court, these statements are far from stigmatizing. In addition, numerous courts have found that statements nearly identical to those at issue here were not stigmatizing. *E.g.*, *Bollow v. Federal Reserve Bank of San Francisco*, 650 F.2d 1093, 1101 (9th Cir. 1981), *cert. denied* 455 U.S. 948 (1982); *Paige v. Harris*, 584 F.2d 178, 184 (7th Cir. 1978); *Lake Michigan College Federation of Teachers v. Lake Michigan Community College*, 518 F.2d 1091, 1097 *cert. denied*, 427 U.S. 904 (1976); *Abeyta v. Town of Taso*, 499 F.2d 323 (10th Cir. 1974); *Clark v. Holmes*, 474 F.2d 928 (7th Cir. 1972), *cert. denied* 411 U.S. 972 (1973).

Finally, this Court has reaffirmed the fact that injury to reputation alone is not enough to establish a cause of action for deprivation of a liberty interest. *Siegert v. Gilley*, 59 U.S.L.W. at 4467, and 4469 (Marshall, J., dissenting). At the very least, the Plaintiff must show that the reputational injury has caused an employment loss. *Id.* Here, Petitioner does not now contend, nor has he ever contended, that any alleged defamatory statements resulted in any employment loss. Clearly, Petitioner is merely contending that defamation by a government official is a constitutional deprivation. However, as set forth in *Siegert*, "defamation by itself, is a tort actionable

under the laws of most states, but not a constitutional deprivation." *Id.* 59 U.S.L.W. at 4467.

Accordingly, for all these reasons, Petitioner has failed to establish any reason why this Court should grant the Petition for Writ of Certiorari on this issue.

F. Petitioner Has No Substantive Due Process Claims.

The courts below properly determined that Petitioner had not alleged a valid substantive due process claim. As stated by the 9th Circuit, Petitioner's allegations that he was improperly demoted do not amount to "egregious treatment" that reaches the level of a substantive due process violation. Appendix A to Petitioner's Brief, page 9a. citing *U.S. v. Salerno*, 481 U.S. 739, 746 (1987).

Moreover, as stated by the District Court, Petitioner is really contending that he was not afforded all of the procedures he was entitled to under the civil service rules. Thus, at most, Petitioner is attempting to raise a procedural due process violation, not a substantive due process claim.

Further, as previously discussed, the underlying issue in this case is whether Petitioner was demoted or merely downwardly reallocated. The Civil Service Commission has ruled that Petitioner was properly reallocated and that political discrimination was not involved. Therefore, at this point in time, there is no basis to even contend that a procedural due process violation has occurred.

Accordingly, Petitioner's substantive due process contentions should provide no basis for the granting of certiorari in this case.

IV. CONCLUSION

Certiorari should be denied as the courts below were correct in dismissing Petitioner's federal causes of action as Petitioner did not have a basis for those claims either legally or factually.

Moreover, as demonstrated in the discussions above, certiorari should be denied as the civil service issues that underlie this entire case are presently being contested in the State courts and civil service proceedings. In fact, the very

issue upon which virtually all of Petitioners contentions are premised, i.e., that he was demoted contrary to civil service rules and procedures, has now been decided against Petitioner after a lengthy civil service trial/hearing. Thus, at the present time, Petitioner cannot even show that his civil service rights were violated, let alone demonstrate that his constitutional rights were violated.

A grant of certiorari will not aid in the resolution of a matter that has gone on now for over six years. To the extent Petitioner is entitled to redress, his relief is through the available civil service and State court proceedings. Therefore, for all of the reasons set forth above, Respondents respectfully request that Petitioner's Petition for Writ of Certiorari be denied.

DATED: Honolulu, Hawaii September 10, 1991.

WILLIAM C. McCORRISTON
STEVEN M. NAKASHIMA
Attorneys for Respondent
FRANK F. FASI

STANLEY E. LEVIN*
*Counsel of Record
CYNTHIA H. THIELEN
Attorneys for Respondent
D.G. "ANDY" ANDERSON

BARRY W. MARR
PATRICK H. JONES
Attorneys for Respondent
LORETTA K. FUKUDA

JARED H. JOSSEM
GREGORY M. SATO
Attorneys for Respondent
GEORGE KEKUNA

APPENDICES

APPENDIX 1

HAWAII SUPREME COURT
FILED December 19, 1989
8:16 a.m.
LOIS E. AIMOTO, Clerk Hawaii
Supreme Court

IN THE SUPREME COURT OF THE STATE OF HAWAII

MALCOLM A. SUSSEL, Plaintiff-Appellant, Cross-Appellee, v. CITY AND COUNTY OF HONOLULU CIVIL SERVICE COMMISSION; HIROO "WOODY" MIYAGI, individually, and in his capacity as Chairman of the aforesaid Commission; ERNEST DIAS, individually, and in his capacity as a member of the aforesaid Commission; BEVERLY NAGY, individually, and in her capacity as a member of the aforesaid Commission; ISABEL TAGALA, individually, and in her capacity as a member of the aforesaid Commission; and NEIL SILVA, individually, and in his capacity as a member of the aforesaid Commission, Defendants-Appellees, Cross-Appellants

NOS. 13430 & 13484

APPEAL FROM THE FIRST CIRCUIT COURT

HONORABLE MARIE N. MILKS, JUDGE
HONORABLE SIMEON ACOBA, JR., JUDGE
HONORABLE ROBERT KLEIN, JUDGE

(CIV. NO. 88-2509-08)

December 19, 1989

LUM, C.J., NAKAMURA, PADGETT, HAYASHI, AND WAKATSUKI, JJ.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

SAME — same — administrative proceedings — in general.

The basic requirement of due process that there be a fair trial in a fair tribunal applies to administrative agencies which adjudicate as well as to courts.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

SAME — same — administrative proceedings — in general.

A biased decision-maker is constitutionally unacceptable. But no one would argue seriously that the disqualification of decision-makers on grounds of actual bias prevents unfairness in all cases. So our system of justice has always endeavored to prevent even the probability of unfairness.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — same — bias, prejudice or other disqualification to exercise powers.

SAME — same — administrative proceedings — in general.

Justice can perform its high function in the best way only if it satisfies the appearance of justice. For in a popular government, justice must not only be done but must manifestly be seen to be done. And there can be little question that use of a truly independent adjudicator is essential to this goal.

ADMINISTRATIVE LAW — in general — bias, prejudice or other disqualification to exercise powers.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

JUDGES — disqualification to act — bias and prejudice — in general.

A judge should avoid impropriety and the appearance of impropriety in all his activities, and he should disqualify himself in a proceeding in which his impartiality might reasonably be questioned.

ADMINISTRATIVE LAW — in general — constitutional and statutory provisions in general — agencies and proceedings affected.

SAME — powers and proceedings of administrative agencies, officers and agents — hearings and adjudications — nature and form of proceedings.

SAME — same — bias, prejudice or other disqualification to exercise powers.

CONSTITUTIONAL LAW — due process of law — constitutional guarantees in general — procedural due process in general.

Since the fundamentals of just procedure impose a requirement of impartiality on administrative agencies which adjudicate as well as on courts, there is no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality.

OPINION OF THE COURT BY NAKAMURA, J.

The question in this interlocutory appeal and cross-appeal from the Findings of Fact, Conclusions of Law, and Order Granting in Part and Denying in Part Plaintiff's Motion for Preliminary Injunction entered by the Circuit Court of the First Circuit is whether "actual bias" or "an appearance of impropriety" should be the test for disqualifying a member of the civil service commission whose impartiality has been challenged by the public employee who brought an appeal from an adverse action by his employing authority. Because an impartial tribunal is an essential component of due process in a quasi-judicial proceeding and "justice must satisfy the appearance of Justice [,]" *Offutt v. United States*, 348 U.S. 11, 14 (1954), we conclude "an appearance of impropriety" is the proper standard and any commissioner whose impartiality might reasonably be questioned should be disqualified from hearing the appeal.

I.

Malcolm A. Sussel was appointed Administrator of the Oahu Civil Defense Agency (OCDA) on June 2, 1982 by Mayor Eileen Anderson after he applied for the position, took a written examination administered by the Department of Civil Service of the City and County of Honolulu, and was interviewed by a selection board. The position, he understood, was a civil service position, i.e., one subject to protection under the "system of personnel administration based on merit principles and generally accepted methods governing the classification of positions and the employment, conduct, movement and separation of public officers and employees[]" prescribed by the City's charter. Revised Charter of the City & County of Honolulu (Rev. Charter), chapter 3, section 6-302. He therefore assumed the system provided "[r]easonable job security for the competent employee[]" who occupied the position and he could not be moved arbitrarily therefrom. *Id.*

But shortly after Frank A. Fasi was elected mayor again after a hiatus of four years, Sussel learned the mayor-elect intended to name George Kekuna Administrator of the

OCDA. Sussel wrote Mr. Fasi advising him that the post was not exempted from civil service and asking the mayor-elect to reconsider his decision. Mr. Fasi, however, was not dissuaded by Sussel's plea; upon assuming office in January of 1985, he appointed Mr. Kekuna as the Administrative Assistant to the City's Managing Director. The Managing Director assigned Mr. Kekuna the powers and duties that had been exercised by the Administrator of the OCDA, and Mr. Sussel was relegated to tasks entailing lesser responsibilities.

Deeming the action a demotion, Mr. Sussel appealed to the Honolulu Civil Service Commission. He averred the demotion was a politically motivated act of the mayor breaching civil service policies and rules. Though the appeal was filed in January of 1985, the commission failed to conduct a hearing thereon for nine months. In the meantime, the composition of the commission had changed. By the time the hearing was convened, two of the four commissioners who were appointed by Mayor Anderson had been replaced by appointees of Mayor Fasi.

The hearing commenced with deputies of the Corporation Counsel advising the commission and representing the employing authority. Mr. Sussel moved unsuccessfully to disqualify the deputy assigned to provide legal advice to the commission, citing Hawaii Revised Statutes (HRS) § 76-47 to support his position.[1/] After hearing the evidence presented by the employee and the employing authority, the commission ruled the position to which Mr. Sussel had been appointed was not a civil service position.

1/ HRS § 76-47 provides in part that:

> When an appeal hearing is before a county civil service commission, the attorney general shall be counsel for the commission and the county attorney or corporation counsel shall be counsel for the appointing authority. If, however, an appeal hearing is before the state commission, the attorney general shall be counsel for the appointing authority and the county attorney or corporation counsel of the county in which the appeal hearing is being conducted shall be counsel for the commission.

The Corporation Counsel takes the position that the provision does not apply to the City and County of Honolulu. We do not reach the question of whether the City's position is correct or not in this appeal.

Mr. Sussel sought judicial review of the administrative decision in the Circuit Court of the First Circuit.[2/] The circuit court reversed the commission, holding the position to which Malcolm Sussel had been appointed was subject to civil service protection. The court remanded the case to the civil service commission for a determination of the merits of Mr. Sussel's appeal.

Upon remand of the case, Mr. Sussel moved to disqualify all members of the commission from hearing his appeal. They were he averred, prejudicially biased because of the civil action then pending in the federal district court. *See supra* note 2. When the disqualification motion was denied, he filed a civil action in the circuit court, reiterating the claims alleged in the federal action and asserting a new claim premised on the commissioners' refusal to remove themselves from his appeal. The state court suit was removed to the federal district court in June of 1988 and consolidated with the earlier civil action. The federal court, however, decided to abstain from ruling on Mr. Sussel's claims against the commissioners and the other defendants in the suits.

In August of 1988, Mr. Sussel brought yet another action in the circuit court. He prayed, among other things, for preliminary relief enjoining the commissioners from hearing his appeal. He called the circuit court's attention to this court's decision in *Honolulu Roofing Co. v. Felix*, 49 Haw. 578, 426 P.2d 298 (1967), where we directed a circuit judge to recuse himself because the circumstances were such as to raise doubts about his fairness, and urged the circuit court to apply "an appearance of impropriety" test in the situation at hand and disqualify the commissioners.

The circuit judge concluded a preliminary injunction should be issued. Applying an "actual bias" test, she concluded one of the five commissioners should be disqualified. She further

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2/ Before the circuit court ruled, however, Mr. Sussel filed a complaint in the United States District Court for the District of Hawaii, alleging that the members of the commission and others had deprived him of his constitutional rights, including the right to a fair hearing.

concluded the commissioner's chairman could not be disqualified under the foregoing standard, but she found his sitting in judgment of Mr. Sussel's claim of a wrongful politically motivated demotion would give "an appearance of impropriety." Though she did not enjoin the chairman's participation in the appeal, she recommended tha he recuse himself. She neither enjoined the participation of the other commissioners in the appeal nor suggested that they recuse themselves.

The circuit judge also granted Mr. Sussel leave to seek interlocutory review of her ruling that a civil service commissioner is disqualified from hearing a public employee's appeal from an adverse action of the employing authority only upon a demonstration of "actual bias."

II.

Mr. Sussel seeks a ruling on appeal that the circuit court erred in applying an "actual bias" test in judging a civil service commissioner's qualification to sit in judgment of a public employee's appeal to the commission from a demotion. The commission and the commissioners, who have cross-appealed, urge a reversal of the disqualification of Commissioner Ernest Dias. Thus, the dispositive issue before us is what standard applies in deciding whether a civil service commissioner is disqualified or not.

A.

The civil service commission is the body within the City government empowered to hear employee appeals. Rev. Charter, section 6-310. "Any person aggrieved by any action of the director of civil service or who has been suspended, demoted or dismissed may appeal to the . . . commission for redress, pursuant to its rules and regulations." Rev. Charter, section 6-308. The commission, therefore, is the administrative agency authorized by law to adjudicate Mr. Sussel's claim that he has been deprived of certain rights ad privileges bestowed by the "system of personnel administration based on merit principles" which has been adopted by the City. Rev. Charter, section 6-302.

"[T]here are certain fundamentals of just procedure which are the same for every type of tribunal and every type of proceeding." R. Pound. *Administrative Law* 75 (1942). "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison*, 349 U.S. 133, 136 (1955). This applies to administrative agencies which adjudicate as well as to courts. *Gibson v. Berryhill*, 411 U.S. 564, 579 (1973)" *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). Of course, "a biased decisionmaker [is] constitutionally unacceptable[.]" *Id.* at 47. But "no one would argue seriously that the disqualification of [decisionmakers] on grounds of actual bias . . . prevents unfairness in all cases." *State v. Brown*, 70 Haw. 459, 467, 776 P.2d 1182, 1187 (1989). So "our system of [justice] has always endeavored to prevent even the probability of unfairness." *In re Murchison*, *supra*.

The Supreme Court teaches us too that justice can "perform its high function in the best way [only if it satisfied] 'the appearance of justice.' *Offutt v. United States*, 348 U.S. 11, 14. *In re Murchison, supra*. For in a popular government, 'justice must not only be done but must manifestly be seen to be done . . . .' *Rex v. Justices of Bodmin*, [1947] 1 K.B. 321, 325." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 172 n.19 (Frankfurter, J., concurring) (1951)). And,

> "[t]here can be little question that use of a truly independent adjudicator is essential to attainment of this goal. Indeed, if there exists any reasonable doubt about the adjudicator's impartiality at the outset of a case, provision of the most elaborate procedural safeguards will not avail to create [an] appearance of justice."

M.Redish & L. Marshall, *Adjudicatory Independence and the Values of Procedural Due Process*, 95 Yale L. J. 455, 483-84 (1986). Our Code of Judicial Conduct and a recent opinion of this court reflect these teachings.

An issue in *State v. Brown* was "whether a judge who causes a criminal contempt proceeding to be instituted may then sit with impunity in judgment of the accused." 70 Haw. at 465, 776 P.2d at 1187. We ruled the judge could not do so, relying

in part on *Tumey v. Ohio*, 273 U.S. 510, 532 (1927), where the Court said:

> Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law."

Our ruling, we noted, was "consistent with our general admonition [to judges] that 'A Judge Should Avoid Impropriety and the Appearance of Impropriety in all his Activities,' Code of Judicial Conduct, Canon 2, and our expectation that [a judge would] 'disqualify himself in a proceeding in which his impartiality might reasonably be questioned[.]' Code of Judicial Conduct, Canon 3 C.(1)." *State v. Brown*, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3.

Since the fundamentals of just procedure impose a requirement of impartiality on "administrative agencies which adjudicate as well as [on] courts[,]" *Withrow v. Larkin*, 421 U.S. 46, we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality. *State v. Brown*, 70 Haw. at 467 n.3, 776 P.2d at 1188 n.3. "Few situations more severely threaten trust in the [adjudicative] process than the perception that a [party] never had a change because the decisionmaker may have owed the other side special favors." M. Redish & L. Marshall, *supra*, at 483.

B.

The circuit court, after hearing Malcolm Sussel's motion for a preliminary injunction, found no evidence that Commissioners Tagala, Nagy, and Silva were biased against him or that their participation in his civil service appeal would create "an appearance of impropriety." It found "evidence of [Commissioner] Dias' actual bias against Sussel." And it found Commissioner Chairman Miyagi "has known Mayor Frank F. Fasi for many years[,] . . . has contributed to [the mayor's and

the managing director's] fund raiser[s, and] is the president and . . . majority stockholder (70%) of MTL, Inc., a non-profit corporation which is under exclusive contract . . . to provide bus service to the City."

The court concluded "the 'actual bias' standard proposed by the Defendants [was] applicable to the . . . case[,]" rejecting "the 'appearance of impropriety' standard proposed by Sussel[.]" It concluded Mr. Miyagi did "not possess a personal bias or prejudice against Sussel or in favor of the named appellees[.]" Nevertheless, it "believe[d] . . . an appearance of impropriety exist[ed] as to [his] serving on the Commission" and "recommend[ed] that Commissioner Miyagi seriously consider voluntarily recusing himself form hearing Sussel's appeal to avoid even the appearance of impropriety." The court thus enjoined only Commissioner Dias' participation in the civil service appeal.

Upon reviewing the record, we likewise believe Mr. Miyagi's participation in Mr. Sussel's appeal to the commission would create an appearance of impropriety. And since we see no reason why an administrative adjudicator should be allowed to sit with impunity in a case where the circumstances fairly give rise to an appearance of impropriety and reasonably cast suspicion on his impartiality, we conclude the circuit court erred in not enjoining Mr. Miyagi's participation therein.

We therefore strike the circuit court's conclusion that an administrative adjudicator is subject to disqualification only upon a showing of actual bias, vacate its interlocutory order, and remand the case for entry of an order consistent with this opinion and for further proceedings not inconsistent therewith.

Charles K.Y. Khim
for appellant, cross-appellee

Jonathan Chun (Alice Fent with him on answering brief),
Deputies Corporation Counsel,
for appellees, cross-appellants

/s/ Herman T. F. Lum
/s/ Edward H. Nakamura
/s/ Frank D. Padgett
/s/ Yoshimi Hayashi
/s/ James H. Wakatsuki

JUSTICES OF THE
HAWAII SUPREME
COURT

APPENDIX 2

UNITED STATES COURT OF
APPEALS FOR THE
NINTH CIRCUIT
FILED August 24, 1989
CATHY A. CATTERSON, Clerk
U.S. Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MALCOLM A. SUSSEL, Plaintiff/Appellant/ Cross-Appellees,) vs. CITY AND COUNTY OF HONOLULU, Defendant/Appellees, and FRANK FASI, et al., Defendants/Appellees/ Cross-Appellants.	)	Nos. 89-15652 89-15697 89-15777 89-15778 89-15779 89-15780 DC# CV-86-1136-DAE ORDER

Commencing at 11:00 a.m. on August 4, 1989 pre-briefing conferences were held in person before Conference Attorney Juliet L. Gee. Malcolm Sussel was represented by William Deeley. City and County of Honolulu was represented by Vladimir Devens and Paula Devens. D.G. "Andy" Anderson was represented by Cynthia Thielen. Loretta Fukuda was

represented by Barbara Petrus. George Kekuna was represented by G. Richard Morry and Bruce Wakusawa. Frank Fasi was represented by Steve Nakashima and Lori Aquino.

(1) Appeals Nos. 89-15652 and 89-15697 are consolidated.

(2) Appeals Nos. 89-15777, 89-15778, 89-15779 and 89-15780 are consolidated.

(3) Defendant Anderson will file a motion to dismiss the issue of representation by Attorney Levine for lack of jurisdiction on or before August 21, 1989. Plaintiff will respond on or before August 31, 1989. Defendant will serve plaintiff with a copy of the motion by personal service.

(4) Plaintiff has stipulated to dropping the issue of defamation in exchange for reduced page requirements by the individual defendants.

(5) The briefing schedule is set as follows:

(a) Plaintiff shall file excepts of record and an opening brief of not more than 50 pages on October 6, 1989.

(b) Defendant City and County of Honolulu shall file its answering brief of not more than 40 pages on or before December 5, 1989 and shall join in the briefs of the individual defendants to the extent possible.

(c) The individual defendants shall file their answering/opening briefs on or before December 5, 1989. The individual defendants shall file a joint brief of not more than 50 pages and each defendant may file, if necessary, a supplemental brief regarding their individual differences of no more than 20 pages.

(d) The Plaintiff shall file an answering/reply brief of not more than 55 pages on or before January 10, 1990.

(e) The defendant city may file an answering brief on the issue of representation to the cross appeal on or before January 10, 1990 of not more than 35 pages.

(f) Individual defendants may file a joint reply brief of not more than 25 pages and optional individual supplemental briefs of not more than 10 pages on or before January 31, 1990.

(g) The court Clerk will calendar this appeal for the first available calendar to be heard in Honolulu, Hawaii.

This order is subject to reconsideration by a judge if any objection is filed within 10 days of the entry of the order.

FOR THE COURT:

/s/ Juliet L. Gee

Juliet L. Gee
Conference Attorney